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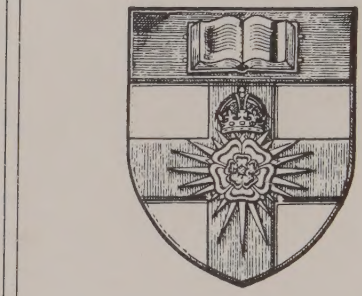

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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RULE UNDER CRIMINAL APPEAL ACT.

R. 48 87

BEFORE THE

LORD CHIEF JUSTICE, Mr. JUSTICE BRAY, and Mr. JUSTICE COLERIDGE.

THOMAS WILLIAM JESSHOPE.

1910
9 *May*

Thomas William Jesshope.

Murder—The Court will not entertain an application for leave to appeal on the ground of insanity unless a strong primâ facie *case is made out.*

This was an application for leave to appeal against conviction on grounds of law and of fact and to call further evidence. Appellant was convicted at the Central Criminal Court on April 29th of murder before A. T. Lawrence J. and sentenced to death.

G. Temple Martin for the applicant, who was not present. The ground of the appeal is that the prisoner had no intention to murder, and that he was insane at the time. The evidence was that he was in trouble and worried, had not had proper food since his last illness, which lasted for nine months, and that consequently his head was affected. The facts are not in dispute, but as regards the defence of insanity, the most important link was missing at the trial, namely, his family history. His grandmother suffered from epileptic fits, according to the doctor's opinion, and his mother also; a younger sister died in infancy in convulsions. A witness was called to produce documents from the Marylebone Workhouse. Objection was taken to the evidence, and it was shut out. Among these documents was one which was really a certificate shewing that he had suffered from convulsions some time previously. It was submitted by counsel for the defence that as the document came from the proper custody, it was admissible. The doctor who made out the certificate could not be found in time owing to his initials having been misread. When admitted to the workhouse the prisoner was suffering from

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convulsions. The prosecution contended his malady was *delirium tremens*. But *delirium tremens* lasts some days, whereas prisoner was out in a day. The learned judge in his summing up also suggested it was *delirium tremens*. The prisoner was removed to a padded room, and the next day taken home by his mother. All this happened ten years previously to the commission of the crime for the conviction of which this appeal is brought. The medical evidence is to the effect that there is brain deterioration throughout the family. In 1907 the prisoner, who was then still with the fire brigade as an employee, contracted a very serious illness, which necessitated his absence from duty for 279 days. The prosecution contended that this was merely an attack of tonsillitis. It was really pneumonia and bronchitis followed by blood poisoning, which rendered it imperative to perform three or four operations. The prisoner's mother and wife were sent for many times, because the prisoner was often at the point of death. The register of St. Thomas' Hospital could not be put in to shew the nature of the illness owing to the fact that it was made up by a number of different doctors who attended the case.

On the father's side there was also evidence of the insanity of the prisoner. A first cousin of the prisoner was in the asylum at the time the case came on for trial; the evidence of the doctor could not be obtained. The facts shewed that this cousin, when in the employ of Peter Robinson's, had taken a number of small articles. He was sentenced to six weeks' imprisonment with hard labour, and when he regained his liberty he was quite insane. It is submitted that this was not a case of kleptomania at all, and that the true nature of his malady appears from the certificate which shews that Victor Jesshope was "very childish and demented," and "had no idea of time or place," was in "feeble health," and "very tremulous."

There was no premeditation nor knowledge of what he was about at the time. A man might do the things the prisoner did and make quite rational remarks, and yet not know what he was doing. After epileptic fits people will go away for a fortnight at a time, during which time they will act quite rationally, and yet the memory is a complete blank. It is true there was evidence that when told by the police constable of the death of the man alleged to have been murdered, he answered, "I know he is dead: I meant it"; but in cross-examination it appeared

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that the constable had not written down one word of that alleged statement. The constable had the man in his custody and was within a yard of him all the time, and if the statement had really been made, he could not have omitted to take it down. Despite this grave omission, the learned judge made no comment on the point in summing up.

It is admitted that before these events the prisoner was very much under the influence of drink; but this cannot shew premeditation.

With regard to the summing up, it is submitted the defence was not put at adequate length nor accurately, The direction as to the real defence was merely that the mother was said to have had fainting fits. As a fact, it was hystero-epilepsy. This was never put to the jury; but on behalf of the prosecution the jury were directed that the doctor could see no evidence that the prisoner was an epileptic.

The jury were misdirected. and this may appear from the fact that they were absent deliberating their verdict for two hours, and twice sent in to the judge, saying that they could not agree.

Travers Humphreys, for the Crown, was not called upon.

The Lord Chief Justice: The Home Secretary has power to order an examination, and has better opportunities of dealing with the question than this Court. That power is in no way interfered with by this Court. All we can do is to quash the conviction if we think the evidence insufficient. This cannot be said in this case. Where irresponsibility is raised as a defence it is most important to ascertain the mental condition before and after the commission of the act, and it will be found in more than one case that very pointed questions are asked to find out whether a man knew or did not know what he was doing at the time. There is nothing here to point to an unbalanced mind in regard to the character of the crime. There seems to be here a murder of the simplest kind, carried out with perfect knowledge, and that was the opinion of the learned judge. The evidence shewed that the prisoner had been discharged from the theatre on the 26th March. Shortly afterwards he said he would "wait for Jack and get his own back." He was discharged, and meant to revenge himself. On

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—
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the same evening a scuffle ensued between the deceased and the appellant, and after that the prisoner said, "I will wait for him another evening." He subsequently stabbed the prisoner with a knife in the most deliberate manner, and when asked, said, "Yes, this is the knife I did it with," and later, when apprised of the death of the deceased, replied, "I know he is dead; I meant it." Whatever may be said as to the weak condition of the man, we have the clearest evidence that he entertained vindictive feelings against the deceased. We should require very strong evidence of general tendency to insanity to satisfy us that he did not know what he was doing. A considerable part of the evidence for the defence relates to a period long before the time of the commission of the offence, or only raises a question that might have to be dealt with by experts. Therefore we cannot possibly entertain this appeal.

Application dismissed.

Solicitor for Applicant—*Frank Hitchcock.*

Francis Augustus Martin.

FRANCIS AUGUSTUS MARTIN.

A co-prisoner by giving evidence implicating appellant does not necessarily become an accomplice.

This was an application for extension of time to raise a point of law and to call further evidence; and for leave, refused by Walton J., to appeal against conviction and sentence.

Applicant was convicted on April 7th, 1910, at the North Riding (Northallerton) Quarter Sessions of larceny, and sentenced to three years' penal servitude.

Gerald Dodson for the applicant, who was not present. Applicant was convicted of stealing a parcel: he was charged with one Johnson, who gave evidence implicating Martin. Johnson did not actually give evidence for the prosecution, but his evidence, it is submitted, ranked with that for the prosecution and was that of an accomplice and uncorroborated.

[Bray J.: If Johnson's story was true, he was not an accomplice at all. The jury believed that they did the act together.]

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There should have been a caution from the Chairman as to the weight to be attached to Johnson's evidence.

The only evidence against the applicant is the evidence of the prosecutor and that of Johnson. The whole case went to shew that Johnson exercised ownership over the parcel. It was Johnson who dealt with it subsequently, and gave the landlady some of the contents. Applicant and Johnson had lodgings with the same landlady, but had only known one another for two days. It could not be suggested that they had formed so close an acquaintance as habitually to go out together.

Martin had really nothing to do with the matter. Johnson implicated him by saying, "I met Martin out, and he asked me to carry it into the house."

There was no doubting the evidence of the police, that the two men said when charged they did not want to state anything. But that was a natural caution to exercise in one another's presence. The mere fact that a prisoner does not deny guilt is not corroboration in itself. *Tate*, (1908) 2 K. B. 680; 1 Cr. App. R. 39; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 21 Cox C. C. 693.

[BRAY J.: It is not that he merely said nothing; it is his saying "I have nothing to say" that went against him.]

But Johnson told a lie at the police court, and though it was ostensibly told in order to secure bail for Martin, it is clear the applicant could have got bail without it, but it shewed how tainted Johnson's evidence was. The Chairman should have said something by way of comment and caution on the evidence of Johnson. (*Tate*, above.)

The very least the Chairman could have done was to guard the jury against the evidence of so plausible a person.

As to further evidence, there is forthcoming that of Mrs. Ingram, who kept the lodging-house. She has now given a statement that the case was so hurried that she did not know what statement to make at the time. She does not know whether the two men went out together on the day in question or not. But she can testify to the fact that Johnson brought the parcel home and gave her some of the contents. It is true the appellant also partook of the food, the contents of the parcel, but though that

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may be to some extent evidence, everyone in the house would have to be indicted if it were regarded as conclusive.

It is desired to call further evidence to shew that the two men went out at different times, and that there was no reason to suppose either from their habits or short acquaintance that they acted or should act in concert. The applicant came to the house on 22nd January, Johnson on the 25th, and the robbery took place on the 27th. The applicant's story was that he went out to see his sister, and the facts go to support that explanation.

The sentence was excessive. There were three previous convictions; one of nine months. But whereas Johnson received only one year's imprisonment, with a record of twelve previous convictions, the applicant was sentenced to three years' penal servitude.

The Lord Chief Justice: The real point in this case is whether the two men were together at the time of the offence, or so shortly after as to shew that they were implicated in the same transaction. There were suspicious circumstances in the case. It is said that there ought to have been some caution given to the jury against accepting Johnson's evidence against Martin. This is one of those cases where it is very difficult to apply the rule about accomplices. If Johnson's story was true he was not an accomplice, and if Martin's story was true, he was not an accomplice. These two men have both told their stories, and it is not altogether surprising that the jury did not believe the story of either of them. It is quite true that the mere saying nothing to a constable may of itself be unimportant. But Johnson made a statement which implicated Martin to a certain extent, and which Martin did not contradict; he merely said he wished to reserve his evidence. The case was essentially one for the jury, and there was no want of direction which could have led to any miscarriage of justice As to the sentence, we have often said that the class of offence of which the applicant was convicted was the more serious in that it might lay innocent persons under suspicion.

Applications dismissed.

Solicitors for the Appellant—*Crowers, Vizard, Oldham & Co.* for *A. E. Sockett*, Middlesbrough.

STEPHEN NORTON.

1910
9 *May.*
Stephen Norton.

On an indictment for carnal knowledge hearsay evidence is only admissible to prove the consistency of the conduct of the prosecutrix: if it is admitted as proof of the truth of her statement the Court will grant leave to appeal.

This was an appeal from the order of Walton J. refusing extension of time, and an application for leave to appeal against conviction and sentence.

Appellant was convicted at Leeds Assizes on March 17th of carnal knowledge of a girl under thirteen, and sentenced by Mr. Commissioner Scrutton, K.C., to ten years' penal servitude.

The notice of appeal did not raise any question of law, but the appellant was allowed to raise the point on the hearing of the application.

L. G. Hoare for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. There was substantial misdirection and substantial non-direction on the following grounds.

The child, who was six years old, was not called. She made a statement in the presence of the applicant the morning after the alleged offence took place. This statement was only hearsay evidence, and if admissible at all was only admissible with a view to shewing the demeanour of the prisoner on the charge being made against him. Inasmuch as he in fact denied the charge at once most emphatically, the learned Commissioner ought to have cautioned the jury against accepting the statement as evidence of the facts alleged therein, and ought to have directed them that such statement was no proof of the charge. The summing up was principally devoted to the question whether the charge made was true, and the inference is that that was all he was leaving to the jury. The jury ought to have been directed that they could only rely on the other circumstances proved in the case, and ought to give no weight to the statement made by the girl.

On the trial of an indictment for such an offence as this the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may be given in evidence against the prisoner, not as evidence of the facts complained of, but as evidence of the consistency of the

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conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent. But here no such story was told at the trial by the girl, and her consistency of conduct was not, therefore, in question, nor was there any question of consent.

Leave to appeal on point of law allowed.

Joseph Wilson.

JOSEPH WILSON.

Severity of sentence—The trial judge is entitled to take into consideration the possibility of part of a sentence being remitted for good conduct.

This was an appeal against sentence by leave of the full Court. The appellant was convicted on March 16th, 1910, at the Central Criminal Court for obtaining goods by false pretences, and sentenced to two years imprisonment with hard labour. He had once been previously convicted for forgery, and sentenced to eighteen months' imprisonment with hard labour.

Turrell for the appellant, who was present. Since 1902 sentences of hard labour as well as penal servitude are subject to the remission of one quarter of the term. The learned judge, in dealing with the prisoner, had no right to take into account that the prisoner would be able by good conduct to earn a remission. He dealt with the prisoner on a wrong principle. He really intended to give the same sentence as last time, viz., eighteen months' imprisonment with hard labour. There was only this one previous conviction. I cannot shew what he has been doing since 1904.

Pickersgill, for the Crown, was not called upon.

The Lord Chief Justice: There is no ground for interfering with the sentence; the previous conviction was for a very serious offence, and a judge is entitled to consider whether there has been real improvement in the prisoner's conduct, and the fact

that, if his conduct in prison is good, he will get a remission of sentence. The term will run from date of conviction.

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Appeal dismissed.

HARRY THOMPSON.

Harry Thompson.

Pretending to buy without any intention of paying is "fraud other than false pretences."

This was an appeal by leave of Walton J. against conviction and an application for leave to appeal against sentence. The appellant was convicted at the Bedfordshire Quarter Sessions on 6th April, 1910, of obtaining hay by false pretences, and sentenced to twelve months' imprisonment with hard labour.

A. R. Churchill for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted from obtaining from Alexander Rastrick 8 tons 15 cwt. of hay, of the value of £25 7*s*. 6*d*, by false pretences, the false pretences alleged being that he was a dealer in hay carrying on business in Bedford; there were also two counts under the Debtors Act, 1869, for obtaining credit by fraud other than false pretences. The grounds of this appeal are that there was not sufficient evidence of the false pretences set out, or that the prosecutor relied upon the statements, or that there was any intent to defraud. As to the first count, which alleged that he falsely pretended on 20th January, 1910, that he had been buying lots of hay in the district, that as such dealer he was in a large way of business, that he was in a position to do a good trade in hay, and that he was in a position to pay for large quantities of hay as and when the same might be delivered to him, there was no evidence of any of these alleged false representations except as to being in the hay business at Bedford, and as to the latter the evidence was very slight. As to the second count, which alleged that he falsely represented on the 22nd January, 1910, that he was then a dealer in hay, and so on as in the first count, and that he then had a banking account at Biggleswade, the representation that he

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banked at Biggleswade was made by the appellant two days after the bargain had been made, and therefore could not have influenced the mind of the prosecutor. The prosecutor also said at the trial that the appellant mentioned to him that "he was commissioned by a Mr. Bryant, of Silver Street, Bedford, to buy poultry for him, and that he bought hundreds." But upon the evidence it was clear this conversation also took place after the bargain was struck, and merely arose incidentally on the prosecutor having caught sight of some fowls. Bryant was called to deny the fact that he had ever dealt with the appellant in poultry, and three bank managers of Bedford were called to shew that the appellant had no banking account in Bedford. More weight was attached to this evidence than was warranted by the circumstances of the case.

There was no intent to defraud, for the terms of the contract were that payment was only to be made when the whole of the hay was delivered. Only 8 tons 14 cwt were put on the rail to the appellant's order, and the appellant sold four trucks containing over 8 tons. Immediately he had sold the hay he wrote to the prosecutor, saying that he had sold the hay, and would see him as soon as he had drawn the money. When, however, the purchasers went to unload the hay, the railway company would not allow them to do so, saying that the prosecutor had stopped it. If the hay had not been stopped the appellant could have paid the money as promised, for he had made a profit of £6 15*s*. upon what he had sold. The summing up was exceptionable because the case was left too generally to the jury. It was not even left to them that the appellant was charged on four different counts.

The sentence was unduly increased by reason of previous convictions. It is true there were eleven previous convictions, but they were all for minor offences, nine being summary convictions for cruelty, drunkenness, and obscene language, one for assault on his wife, but only one for false pretences, for which he had suffered three months' imprisonment with hard labour.

Stimson for the Crown. With regard to the counts for obtaining by false pretences, the indictment was based upon the case of *Cooper*, 2 Q. B. D. 510; 46 L. J. M. C. 219; 36 L. T. 671; 25 W. R. 696; 13 Cox C. C. 617; C. C. R. It really charged him with having a bogus business. The evidence

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shewed conclusively that he was not in a position to do any business at all. This case is substantially similar to *Cooper's case*, with the difference that there the representations were not verbal, but by letter. The evidence shewed that the prisoner was living at a common lodging house in Bedford at a rent of half-a-crown a week, and that six weeks of arrears of rent were owing. The prisoner said, "I'm a buyer of hay," stated that he bought at Wellingborough, and generally held himself out as a hay dealer. He actually said this in his evidence; and before these representations were acted upon he made a second pretence to the effect that he had a banking account.

[*Churchill:* This is not accurate: the evidence of Rickman, a railway employee, shewed that the hay began to be delivered on January 21st, whereas the conversation with reference to banking at Biggleswade took place on January 22nd, *i.e.*, after prosecutor had made up his mind to, and had, in fact, begun to deliver.]

Eight trucks were delivered, and four were stopped. The prosecutor managed to get back four tons when he ascertained the appellant's real position. About £6 was received by the appellant from the people who bought in London, and that money was received by the appellant's solicitors. The appellant received the whole or part of the purchase money of about four tons, amounting in all to about £21.

The two other counts were framed on the case of *William Jones*, (1898) 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 19 Cox C.C. 87; C. C. R. The prosecution can rest its case solely on the charge of obtaining credit by fraud if it be held that the appellant was not guilty of obtaining by false pretences. Even if a direct false pretence cannot be proved, the jury may infer that the defendant acted fraudulently from his conduct alone. Apparently the whole case went to the jury on this: Did the prisoner intend to deal honestly and pay, or not? It did not go to the jury on the question of false pretences. The Chairman directed the jury thus: "Are you satisfied that Thompson in his dealings with Rastrick intended to deal honestly with him and pay for the hay, or did he intend to deceive?" This in no way prejudiced the prisoner.

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[Lord Coleridge J.: My difficulty is this: He sold a quantity of the hay, and was to receive a profit, and before he could get all of the hay, it was seized by the prosecutor. He could not get both hay and money. The lot was sold, and the profit was to come out of the lot. Therefore there is ground for the prisoner saying, "I cannot pay you." There is a *locus pœnitentiæ*, and the prosecutor seems to have stopped him.]

The point is rather that there was fraud in the inception of the transaction. Moreover, he could have paid some of the money, but did not pay a penny.

As regards the summing up, it was not necessary to direct the jury at greater length. The same jury had been the whole morning engaged in trying a case of obtaining credit by fraud, and in the opening of the case against the appellant the law as laid down in *Cooper* and *William Jones* was explained to them, and in addition the statement in *Edwards*, 42 Solrs. J. 472 (1898), as to what they should be satisfied of before they convicted.

Churchill, in reply: *Jones* is not in point; it is in a different class of case; there would be no question of a profit on resale in that case, as here: as regards *Cooper*, no such representations were made by the appellant as in that case, and see the judgment of Denman J. at 515. He merely stated that he was in business at Bedford.

The summing up was totally inadequate in all the circumstances of the case.

Bray J.: In this case the prisoner was charged first with having obtained hay by false pretences, and secondly with obtaining credit by means of fraud other than false pretences. The first false pretence alleged was that he was a dealer in hay carrying on business in Bedford. There seems to us to have been ample evidence of this false pretence. The cross-examination of the prisoner shewed quite clearly that in no sense could he be said to be a hay dealer in Bedford. There was ample evidence on that count. One of the other counts alleged that he obtained hay by fraud. The cases establish this: that if a man never had any intention to pay, that is fraud other than false pretences. There

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was ample evidence of that too. The prisoner set out in his notice how he was prevented from making payment. He received £7 : 5*s*. for part of the hay, and dealt with that money in some other way, not paying a farthing to the prosecutor. The jury were quite at liberty to take that into consideration, and the false pretence that he had a business in hay dealing in Bedford was evidence of fraudulent intention. The summing up was not as full as it might have been; but Mr. Stimson says he explained the law to the jury, put it that there was this false pretence and no intention to pay, and cited the case of *Cooper*. The conviction must stand, but the sentence will run from the date of conviction.

Appeal dismissed.

JOHN THOMAS MULLINS.

John Thomas Mullins.

Evidence of a previous caution against committing an offence of a certain kind is not admissible on the trial of an indictment for an offence of that kind.

This was an appeal against conviction by leave of Walton J. Appellant was convicted at the Sheffield City Quarter Sessions on April 1st of receiving stolen goods, and sentenced to twelve months' imprisonment with hard labour.

Fleming, for the appellant (under s. 10 of the Criminal Appeal Act) who was present. The appellant was convicted of receiving 1 cwt. 1 quarter and 20 lbs. of lead, knowing the same to have been stolen. The indictment set out that he received the lead from two persons, named Mary Ann Coggin and Edmund Smith. The evidence for the prosecution was largely that of a thief and of a probable receiver, and far too much reliance was placed on such evidence. Smith, a lad of fifteen years of age, gave evidence that on the 10th, 11th, and 12th January he and two other boys stole lead from a house; that Smith and a woman

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named Duke or Coggin took the lead to the shop of the prisoner after having hammered it up in her house in a suitable state for carriage. But that evidence was in no way corroborated. The woman had no recollection even of the month she went to the prisoner's shop. The Assistant Recorder, in summing up, said: "It is established that he was three days taking the lead to this man, and the woman took it with him" (*i.e.*, Smith). No such fact was established, and it was wrong to direct the jury that that was corroborative evidence of Smith's tainted evidence. How little Smith's statement could be relied upon was shewn by the fact that he and the woman were in conflict as to what happened on coming out of the shop.

[LORD COLERIDGE J.: The prisoner admitted he bought a quantity of lead on the 13th. He made no entry of the purchase as required by the Sheffield Corporation byelaws, and he admitted that he bought from the woman after the police had been in.]

He gave the name and address of the woman, and paid a proper price for the lead. He did not make the requisite entry owing to the mental pressure he was under at the time from the fact that that very night his child was on its death bed. When the police came in to his shop to make inquiries he said. "I never bought any lead yesterday." Why should he not be believed? The appellant is a man of excellent character, and was for eleven years, before taking his present business of a marine store dealer, in the employ of Brown, Barley and Dixon; he only left because they were short of work. On the 7th December he was seen and cautioned by a detective. It is submitted that this cannot be evidence, and ought never to have been left to the jury; it is mere prejudice. He could easily have explained what happened on that date had it been put to him.

In his summing up the Assistant Recorder said that the woman Coggin or Duke did not say how she could carry so much lead at once; but this was not so; she explained that she and the boy went back home and made two journeys of it.

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A. J. Lawrie for the Crown. As to the warning or caution given in December, even if it is to be construed as an insinuation that prisoner had been guilty of another offence on a previous occasion, the character of the prisoner was in issue from the very first; his character was put in issue by the nature of the cross-examination of Smith and the woman Coggin. Smith was accused in cross-examination of having stolen on a previous occasion. This involves an attack on the prosecution which is sufficient to justify a counter-attack on the prisoner's character, and he said in his evidence in chief that he had never been in trouble before.

But the whole point of the question objected to was not whether he was of good or bad character. It was a question of whether or not he had guilty knowledge. So that the evidence was admissible apart from the question of character altogether. The caution was an important circumstance, as shewing his state of mind. He admitted having lead in large quantities, and said he did not know he was doing any harm. In any case the evidence was given only after the appellant's character was in issue.

Fleming, in reply. The caution could have no other effect than to suggest that the appellant had been in trouble before.

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Lord Coleridge J. read the following judgment.

I do not think that we ought to allow this appeal. There was ample evidence for the jury in connection with the appellant's conduct on the occasion or occasions of the purchase of the lead, his neglect to make a proper entry in his books and the suspicious circumstances under which the lead was brought to him. The prosecution gave evidence to prove that on January 10th, 11th, and 12th a woman brought the lead to the appellant under highly suspicious circumstances. No doubt on this point the evidence was that of accomplices, and this was pointed out to the jury in the summing up, and they were warned against relying on such evidence without further proof. But it was further clearly proved that on January 13th the police asked the appellant whether he had bought certain lead from a woman, and that he denied it. The appellant sought to meet

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the effect of this evidence by asserting that the lead was brought to him at one time by the woman on January 13th, after the visit of the police. On these facts there was clearly evidence on which a jury might find that the appellant had received the lead knowing it to be stolen.

An objection was taken to the following questions put by the prosecution to a detective officer:

Q.—On the 7th of December you were at the defendant's place?

A.—I was.

Q.—And on that occasion did you caution him with regard to dealing with lead?

A.—I did, sir.

The evidence after objection taken was admitted.

If these questions and answers would lead the jury to believe that the police had found him dealing with stolen lead, it is clear that they would have been inadmissible. Does this evidence reasonably convey this imputation? With some doubt we believe that it does. We think it important that any evidence of this kind, which is so near the line, should not be admitted. When, however, we have to consider the proviso to sect. 4, sub-sect. (1) of the Criminal Appeal Act, we feel bound to come to the conclusion that no substantial miscarriage of justice has actually occurred. It was a very minor incident in the case, it was not even alluded to in the summing up, and there was ample evidence *aliunde* to support the conviction.

Appeal dismissed.

Sansom Stanley.

SANSOM STANLEY.

Severity of sentence in the case of receivers of stolen property.

This was an appeal by leave of Walton J. against conviction. Appellant was convicted on 6th April, 1910, at the Dorset Quarter Sessions of feloniously receiving twenty iron hurdles, and a set of old harness, of the value of £3, and sentenced to six months' imprisonment with hard labour.

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There was also an application for leave to appeal against sentence and to call another witness.

Harold Gundry for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The prosecutor, Fudge, was a butcher with a business at Wallis Down near Wimborne, who was in ill-health and unable to attend very much to his business. He left the business in charge of three men, Lockyer. Trent and Price. Appellant was a licensed hawker living near Fudge; he purchased the goods in question from the three men, Lockyer, Trent and Price, who were charged with stealing them, and pleaded guilty. From the first, appellant protested that he did not know the goods were stolen and believed the vendors were the rightful owners. Lockyer was called at the trial, and if his evidence was to be believed it seriously implicated appellant. But in his summing up, the Chairman did not point out that Lockyer was an accomplice and that his evidence required corroboration. With the sole exception of Lockyer's evidence there was nothing inconsistent with appellant's innocence. It is true that police constable Cross in his evidence in chief said that appellant, when in Fudge's premises, "looked each way several times and then looked towards the premises and held up his finger and beckoned some one to come on." But he merely called his daughter who was outside to come on with the van. The men he dealt with were respectably dressed and of good appearance; they were in open possession of the place, and it was elicited in the cross-examination of the police constable Cross that anybody passing that way could have seen anything that was going on. Cross was quite well known to appellant; he came in and spoke to the people there; he admitted his conversation there was with reference to Fudge's health. Appellant would hardly have gone on if guilty, for the van driven by his daughter had his name on it. There was no concealment whatever. When Cross came to appellant's premises, appellant, on being asked about the hurdles replied, "Here's the stuff here. I bought it for old iron," and told him how much he had given for them. Appellant gave every assistance to get the hurdles to the police station. The value put upon them as "old iron" by the valuer called by the prosecution would come to just about the same sum as appellant gave.

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The summing up was not fair to the prisoner. There being no direction on the nature of Lockyer's evidence, the inference is clear that the jury did not understand the necessity of corroboration of a thief's evidence. Appellant had carried on the business of a hawker—a business involving a certain amount of danger—for twenty-four years without getting into any trouble. This charge was the first brought against him.

[Bray J.: You have not yet explained the latter part of appellant's answer to the question, "Did you understand that you were going to have a look at the old iron?" where he replied, "He [one of the thieves] told one of them to poke his head into the stable and not look at anybody coming into the yard."]

That may be a strange answer, but it is not enough to warrant a conviction. The sentence was too severe. The three thieves were tried under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17); there were no previous convictions against appellant, therefore he could not be said to make or tempt thieves. The prosecutor said he did not wish to press the charge.

Yeatman for the Crown was only called upon as to sentence. Fudge was cross-examined. He was quite willing to give evidence against appellant.

The Lord Chief Justice: There was both substantial evidence and corroboration. The police constable swore to seeing a man looking up and down the yard. Again there is the prisoner's own statement that one of the thieves told another to put his head inside and not look up and down. The value put upon the hurdles was £2 10*s*. and the prisoner only gave 10*s*. That is not a small difference and is further evidence in corroboration. The story told about the harness was a strange one; in answer to the question, "Will you tell us how the harness came to be taken?" the prisoner answered, "Well, I did not know anything about the harness until the van got out into the road. When I came to the horse to take him home I saw that there were some few collars, put on top of the iron, and I thought it was no good, and that they might have chucked it up there for me to take away. That is how I thought of it." It rather looks as if it had been

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added to induce a bargain. There was, we think, a substantial case to be considered by the jury, and there was no such miscarriage of justice as to make it necessary for us to interfere.

With regard to the sentence of six months (now four and a half) it is undoubtedly severe for a first offender. But this Court has frequently had to point out that receivers to some extent make the thief. The appellant was not such a person; but looking to the difficulty of tracing these stolen goods, while we think the sentence rather severe, we do not think we ought to interfere with it. There is no question of principle involved, and no principle wrongly applied. Therefore the conviction must stand, but sentence may run from the date of conviction.

Appeal dismissed.

FREDERICK HADFIELD NAYLOR.

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Hadfield
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It is not misdirection to abstain from pointing out to the jury that they have the power to find a lesser crime than that charged.

This was an appeal against conviction and an application for leave to appeal against sentence. The appellant was convicted on 13th April, 1910, at the Manchester Assizes before Mr. Justice Grantham of feloniously wounding with intent to do grievous bodily harm, and sentenced to five years' penal servitude.

Gibbons for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was indicted for feloniously wounding Sarah Hadfield Naylor with intent to murder her at Manchester on the 6th March, 1910, and with intent to do her some grievous bodily harm. The learned judge never left the third alternative of unlawfully wounding to the jury. The facts shewed that the appellant and his wife were separated, appellant living in London and his wife in Manchester. On March 6th appellant went up to Manchester, taking with him the tools of his trade as a bookmaker, among which was a hammer. The hammer was for hammering down pegs that are sometimes used by bookmakers. He went to the house where his wife lived.

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and, according to her evidence, she was not very pleased to see him. He asked her to get him some tea. She refused; whereupon he took the hammer out of his bag and hit her on the head with it. He then left the house, and was shortly afterwards apprehended by police constable Cooke. He admitted he had come up to Manchester to assault his wife.

[Bray J.: There is more than that. At the police station, after saying, "I have come all the way from London specially to do it, and I have done it," he goes on to say, "I will suffer the consequences. There are better days in store. I hope she is —— well dead." If that evidence is believed, he ought to have been found guilty of attempted murder.]

There was only the evidence of the wife and Cooke. Of course there is no doubt appellant was in a bad temper at the time. The wife said in her evidence: "You were in a very bad temper; we will allow for that." The prisoner was not defended. He gave evidence himself, and was most anxious to negative intent. His view was that he had not intended any harm. He had great provocation. He suggested there was a man called "Scotch Jimmy" in the house living with his wife; that this man used bad language to him, and refused to go out of the house. That thereupon he took out the hammer, meaning to "go for" "Scotch Jimmy." The evidence of the prisoner was that the wife rushed in as he was about to strike Scotch Jimmy, and that then he struck her on the head. Admittedly self-defence could not have been put to the jury as an alternative. The only question was that of intent. In the summing up the third alternative of unlawful wounding was never put at all. The only threat in the letter to the wife was that prisoner said he was coming up to Manchester "to stuff his fist in her eye." It is true he admits that he struck her; but the learned judge ought to have put to the jury the prisoner's story that he remembered nothing of the alleged admissions to the officer.

[Bray J.: Self-defence is not your proper answer at all. What we want to see is whether if his story be true, he might have been convicted of unlawful wounding only.]

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The act was done in a hasty moment, without thought or intent. The jury ought to have had put to them the third alternative of misdemeanour.

A. J. Laurie for the Crown. The prisoner cross-examined some of the people alleged to have been in the house at the time, and they do not even suggest that any one else was present. All the rest of the evidence goes to shew that Scotch Jimmy was not there at all. There is no suggestion anywhere, apart from the prisoner's statement, that there was any provocation. There can be no question of self-defence. The intent was to do the natural consequences of his act, and the medical evidence shews how serious the wound was and how much force was used. There is no circumstance which could reduce the crime to unlawful wounding.

The Lord Chief Justice: This appeal must be dismissed. It is said the learned judge in the following passage did not sufficiently put the defence to the jury, or direct them as to their power to reduce the crime to the misdemeanour of unlawful wounding: "It seems to me the only question for you is whether or not in striking her as he did, did he intend to murder her, or whether it was done with intent to do grievous bodily harm; and I think you will be of opinion that if a man uses a deadly weapon like a hammer on a woman's head and smashes her skull in the way he did, the least you can find is that he did it intending to do grievous bodily harm. The evidence is such as would justify you in saying that in doing it he intended to murder her. The mere fact that the wife, as most wives do, says she does not think he did, is no evidence that he did not do it. Still, at the same time juries are generally inclined, and very properly, to take the most lenient view they can." It is contended that not telling the jury they might reduce the crime to unlawful wounding on this indictment amounts to misdirection. This Court cannot take that view. The option of the jury to find the lesser offence must depend on the particular circumstances of the case. It cannot be said as a matter of law that the judge must always tell the jury they can find the lesser offence. The jury were entitled to consider the prisoner premeditated injury to the wife and came up to Manchester in order to injure her. The evidence of the doctor

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cannot be disregarded. The cut was one inch long. Underneath the cut the skull was broken into a number of pieces, some of the pieces being forced into the brain, and the left arm and leg were paralysed at the time in consequence of the blow. The prisoner in his evidence does not say that in endeavouring to strike someone else he struck her by accident. Indeed, his evidence is directly contrary to this, and points to the fact that he struck deliberately, not accidentally; and there is other evidence to support that view. There is no evidence of self-defence. The only suggestion is that there might have been some provocation owing to the presence [illegible] "Scotch Jimmy." But the omission to put that is not misdirection. It is doubtful whether it would have been a proper direction to put it at all. There are cases in which it is proper not to tell the jury that they can reduce the crime to unlawful wounding, and this is one of them.

Appeal dismissed.

Frederick Jackson.

FREDERICK JACKSON.

In the absence of a submission the judge, at the close of the case for the prosecution, is not bound to withdraw the case from the jury: George (1 *Cr. App. R.* 168; 1908) *confirmed.*

If a defence is opened the Court will review the whole case.

This was an appeal against conviction and sentence. Appellant was convicted at the Cheshire (Knutsford) Quarter Sessions on April 4th, 1910, of stealing thirty electric lamps, and sentenced to twelve months' hard labour.

Ralph Sutton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was indicted together with a man named Gilder for stealing thirty lamps from a house in Hyde. The lamps were alleged to have been fitted up in the house by Cant, an electrician of Stockport Road, Hyde. It was alleged that thirty-eight lamps of a special voltage (about 50) were fitted up on or about September 24th, 1909, and that the lamps sold on that day had certain numbers stamped on them, and that this was evidence on which the lamps stolen could be

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identified with those fitted up in the house before mentioned. At the close of the case for the prosecution there was not a shred of evidence offered by the prosecution against Jackson, and the Chairman ought to have directed an acquittal so far as Jackson was concerned. It is true appellant has not taken this point in his notice of appeal, but he defended himself and drew the notice up himself, and ought not to be prejudiced by the omission. The first ground of appeal is that the case ought to have been withdrawn at the close of the case for the prosecution. (*Frederick Joiner* (1910), W. N. 43; 26 T. L. R. 265; 74 J. P. 200; 4 Cr. App. R. 64.)

[Lord Coleridge J.: In the absence of submission, a judge is not, in law, bound to withdraw the case from the jury. *George*, 1 Cr. App. R. 168; 73 J. P. 11; 25 T. L. R. 66 (1908).]

My submission is that there was absolutely no case for the prisoner to answer at the close of the case for the prosecution.

[The Lord Chief Justice: *George's case* shews that if prisoner elects to give or call evidence, this Court will look at the case as a whole. There was evidence after the case for the prosecution was closed that the appellant had eighteen lamps in his possession; and there was the evidence of Gilder who said he had sold a great number of lamps for Jackson from time to time. On the point of miscarriage of justice we are entitled to look at the facts as a whole.]

The Court refused to do so in *Joiner* on the ground that it was the duty of the judge to withdraw the case. As it is his duty, I submit that the failure of the prisoner to call upon him to do it can make no difference any more than the failure of the prisoner to object to inadmissible evidence entitles the judge to admit it. It is a startling proposition that the prosecution may, when two undefended prisoners are jointly indicted, rely on the probability that neither will understand anything about "submissions" and need, therefore, offer no evidence against one of them. To say that a prisoner elects to go on is to ignore the fact that most prisoners know nothing about criminal procedure.

Appellant said he obtained the lamps from a man named

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Thornley and that he brought them to Gilder that the latter might secure a purchaser. It is true that Broadbent bought eighteen lamps of low voltage from Gilder, but my submission is that the lamps were not stolen. There was no evidence of identification. Any number of lamps bearing the same number might be sold on the same day, as was admitted by one of the witnesses on cross-examination.

The second ground of appeal, therefore, is that there was no evidence that the lamps were stolen. The prosecution ought to have proved what had become of the similar lamps sold on that day. Broadbent's evidence to the effect that he happened to shew the lamps to a friend of his who said they were stolen, was the merest hearsay. The prosecution were put to the greatest difficulty in proving that the lamps were stolen, and as this hearsay evidence was allowed to go to the jury, it is very probable they attached great importance to it.

In the summing up the jury were told that two witnesses identified the lamps; one witness merely guessed at the identity, saying in answer to the question "You have seen them—are they the same ones?" "As far as I can see." The other did not say he identified them at all; he merely said the voltage was unusual, and in his evidence said, "As there are other lamps bearing a similar number I am not in a position to identify the lamps." There was no caution by the Chairman to the jury that the prosecution were bound to satisfy them that the lamps were stolen; on the contrary he led them to believe that if they were "inclined to think," that is, suspected, that the lamps were stolen, the onus was shifted on to appellant to account for his possession of the lamps. The Chairman said, "The method of identification seems to be as perfect as possible under the circumstances." That is quite incorrect. He went on to say, "These lamps were numbered as sold that day—the voltage being peculiar to the district—and no complaints of any missing lamps similar to the number sold on the same day as the lamps in question have been received, and I think you will come to the conclusion that the lamps are the stolen lamps." How can the fact that no complaints were made be evidence against appellant that the lamps in question were stolen?

This was, in fact, a not very successful effort to prove, by illegitimate means, that other purchasers of similar lamps still had them in their possession, and this misdirection, coupled with

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the other inaccurate statements and with the fact that other hearsay evidence was allowed to go to the jury, makes it impossible for the Court to say that the jury would have come to the same conclusion if they had been properly directed. On this ground, too, the conviction should be quashed.

Artemus Jones for the Crown was not called upon.

BRAY J.: We are of opinion that this case is governed by the case of *George*. The point was never submitted to the judge at the close of the case for the prosecution, and therefore as the prisoner elected to go on, we may look at the case as a whole. As regards the submission that there was no evidence that the lamps were stolen, and that taking all the evidence together there was no identification of the lamps in Gilder's possession, we think that though the evidence was not strong, there was evidence of identification and that there is no doubt the lamps sold to Broadbent were the lamps stolen from the house in question. Therefore the conviction must stand as a conviction.

The appeal against the sentence must also be dismissed. Among the previous convictions was one in 1909 for stealing twenty-four lamps, and there was also an offence committed in January last for which he was sentenced to four months' imprisonment; and after this there is still another offence. The nature of the offence, the subject of this appeal, fully justifies the sentence.

Appeal dismissed.

ERNEST MARSHALL.

Ernest Marshall.

Habitual criminal—The Court will not give effect to a merely technical objection to the statutory notice of "other grounds" unless it is formally raised by the notice of appeal.

This was an appeal against conviction as a habitual criminal. The appellant was convicted on 7th April, 1910, at the Essex (Chelmsford) Quarter Sessions of larceny, and of being a habitual criminal, and sentenced to three years' penal servitude and five years' preventive detention.

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E. W. Fordham for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The notice required by sect. 10, sub-sect. 4 of the Prevention of Crime Act, 1908, was bad, because the evidence on which appellant was convicted as a habitual criminal shewed that he did make an effort to lead an honest life, and kept his work until injured by an accident.

The prosecution inserted in the indictment, to support the charge of being a habitual criminal, three previous convictions, one on November 25th, 1903, one on April 5th, 1905, and a third (this being his last previous conviction) in January, 1907, on which conviction he was sentenced to three years' penal servitude.

The facts shewed that the appellant was discharged on licence from Maidstone Prison on 2nd April, 1909; before leaving the prison he underwent an operation for abscess on the ribs. After leaving the prison, he secured work at four different places, but had to give up work in order to undergo two more operations. He had worked for ten weeks as a cowman before being injured by a fall from the cart he was driving to a station, which accident retarded the progress he had seemed to be making in his health. He came out of hospital six weeks later and remained in Chelmsford for a time. Then, three months after his liberation, he went from Chelmsford up to the London district and was to undergo another operation at Guy's Hospital. This operation did not take place. He then fell back into petty larcenies. On his arrest in March, 1910, he voluntarily admitted to Superintendent Jones, stationed at Romford, that he had stolen jewellery from a lodging at Rochester, and that he had also stolen £1 6*s*. from lodgings at Hampstead in January, 1910. The officer, at the trial, put before the Court these larcenies, in order to shew that immediately after the expiration of his licence he had returned to bad habits.

These admissions of two petty larcenies were not inserted in the notice. The prosecution wrongly gave evidence of something not fairly included in the notice. Sect. 10 (4) (b) of 8 Edw. 7, c. 59 (Prevention of Crime Act, 1908) requires that the notice to the offender "shall specify the previous convictions *and the other grounds* upon which it is intended to found the charge" of being a habitual offender. Therefore this notice did not state the "other grounds" required by the Act.

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[Bray J.: He does not complain of this in his notice of appeal; it is the purest technicality.]

That is so. But he raises the point in a certain way. In his notice he states that he was sentenced "for not seeking work after being released from prison on the 2nd April, 1909, and I wish to prove before the Court that I have worked at four different places, and had to give up work to undergo two operations."

The judgment in *Edward Turner*, (1910) 1 K. B. 346; 3 Cr. App. R. at 160; 26 T. L. R. 112; 79 L. J. K. B. 176; 74 J. P. 81; 54 S. J. 164, shews that the ground upon which it is intended to found the charge must be stated, though there is no obligation to state the evidence.

It is more than a technical point, for the petty larcenies were almost contemporaneous with those on which he stands charged on the first two counts of the present indictment. In the conditions he should not have been put on his trial on the charge of being a habitual criminal.

[The Lord Chief Justice: The three statutory convictions may be enough in a proper case. *Waller*, (1910) 1 K. B. 364; 3 Cr. App. R. 213; 79 L. J. K. B. 184; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142, extended the principle of notices in *Turner's case*, at p. 223.]

My submission is that if the appellant's contention is not allowed the Court will be overruling *Turner's case*, and rendering nugatory the provision in the Act of Parliament. Were this an ordinary case, there might possibly be something to be said against appellant's ground of appeal. But from his first conviction in 1891, he has only spent six years in prison, and on being released finally he did lead an honest life.

E. H. Tindal Atkinson, for the Crown, was not called upon.

Lord Coleridge J.: In this case the appeal is against conviction for being a habitual criminal; the necessary offences were proved, and the notice required by the Prevention of Crime Act,

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1908, stated that the appellant made no effort to obtain work after being released from prison on the 2nd April, and was persistently leading a dishonest life, but did not include any allusion to any subsequent offence being committed. He was released from his lost period of imprisonment on April 2nd, 1909, but came out under licence; he reported himself regularly under his licence up to December, during which period he was employed at East Hanningfield for about ten weeks as a cowman, had sustained an accident for which he got compensation, and then went to the Metropolitan Police district. He admitted just before the commission of the offence for which he was convicted on April 7th last, to the police officer, that he had committed two offences of larceny; there were also three other offences on which he was convicted or pleaded guilty. We are asked to say that as the notice contained no reference to these offences of January. they ought not to have been given in evidence. *Turner's* and *Waller's cases* have been alluded to. In those cases Channell J. and the Lord Chief Justice stated clearly that if the Crown were going to rely upon other grounds than the mere statutory convictions these other grounds must be specified in the notice. It is said by Mr. Fordham that they were not specified. That may be; but the appeal is not on that ground. The prisoner appeals against the sentence on the ground that he had worked at four different places, and only gave up work to undergo two operations. The notice of appeal was grounded on other proof altogether: the appellant relies, therefore, on the mercy of the Court. He admitted these offences, and did not object at the trial to their proof. The case was fairly left by the Chairman. All we have to say is that there is no ground for appeal in regard to it. The proviso to sect. 4 (1) of the Criminal Appeal Act enables us to dismiss the appeal if no substantial injustice has occurred; and on that ground the appeal must be dismissed.

Appeal dismissed.

EDWIN JONES.

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Habitual criminal—The Court will not give effect to a mere technical objection to the statutory notice if there has been no miscarriage of justice.

This was an appeal against conviction as a habitual criminal and against sentence, together with an appeal from the order of Walton J. refusing leave to appeal against conviction. The appellant was convicted on March 11th, 1910, at the Birmingham Assizes, before Darling J., of the larceny of goods belonging to the Midland Railway Company, and of being a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention.

A. Ralph Thomas for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. I have gone through the evidence on the charge of larceny; the application for leave to appeal from the conviction seems to have been made under a misapprehension, because the appellant thinks his identity was not sufficiently established. With your lordships' leave I do not propose to deal with that part.

The original notice to the appellant under the Prevention of Crime Act, 1908, was bad; it contained errors. A notice correcting these errors was served on appellant the day before his trial. He was not defended and no objection was taken. He could not have been expected to take objection to the formal notice; he did not even understand the meaning of "habitual criminal." My submission is that the original notice was wrong in essential details; one of the three statutory previous convictions alleged was burglary, which was described in the notice as a conviction in the name of Edwin Jones, whereas he was convicted in the name of Johnson, and the second was for stealing apples, whereas in reality it was a case of malicious damage, an offence which could not be proved for the purposes of this Act. The notice subsequently served was too late and could not cure these defects.

My second submission is that one of the convictions was not strictly proved. With regard to the conviction for burglary in the name of Johnson he was not identified at all.

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[The Lord Chief Justice: The man himself does not suggest he was not there; and sect. 10 (5) of the Prevention of Crime Act, 1908, which enacts that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life," seems to be against you.]

My submission is that the three statutory convictions must be proved strictly, although less strict evidence may be admitted as to his mode of life; he ought none the less to have had notice of the other felony; and that the conviction for malicious damage is useless. The notice was quite inaccurate

[The Lord Chief Justice: The original notice was sent before the seven days, and the prosecution had proof of the record. Is not that enough, coupled with his admission?]

The appellant did some work in 1908; evidence of his good conduct for a period of five months since his release ought to have been given; he has been at work chopping wood for his brother during that time. The man unquestionably did the work, although the detective who gave evidence thought it was insufficient to keep him. In any event this is a stronger case than *Baggott's case*, 4 Cr. App. R. 67; 26 Times L. R. 266 (1910), where the evidence that the appellant was by repute known as a cunning and dangerous thief, and that he had refused work in the shape of stone-breaking was held insufficient to shew a persistently dishonest and criminal life.

Beale, for the Crown, was not called upon.

The Lord Chief Justice: The appellant has raised a point to be considered. We might have allowed it if it were not for the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. The Prevention of Crime Act, 1908, says that seven days' notice must be given, and that the notice shall specify the previous convictions and the other grounds upon which it is intended to found the charge. A notice was sent on 1st March, and in it was in-

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cluded a charge which could not come within the three requisite statutory convictions. The prosecution amended the notice on the 10th March and inserted a third felony. Any question as to the three convictions could then have been raised by the appellant. We ought not to give effect here to his present objection unless there has been a miscarriage of justice. There is no substantial ground for saying that there was not proper evidence that he was a habitual criminal. He had a long list of previous convictions. It is said, however, that there was not sufficient evidence with regard to the five months since his release from his last term. The appellant in his hearing is said never to have done any work except a little chopping for his brother at home, which would not bring in sufficient for his own existence. He is also said at the same time to have led astray two of his nephews. It is one of those cases where there is quite sufficient evidence that the man was not living an honest life, and it is impossible to say the jury were not justified in finding him guilty. There is, therefore, no ground for saying he was not properly convicted. The sentence will run from conviction.

Appeal dismissed.

GEORGE MARTIN.

George Martin.

On a charge of being a habitual criminal, it is not necessarily a defence that he has been at work since his last release.

This was an appeal against conviction as a habitual criminal by leave of the full Court. On May 3rd the application, referred by Walton J., was granted as well as an extension of time.

Appellant was convicted on 25th January, 1910, at the Birmingham City Quarter Sessions of housebreaking, and sentenced to three years' penal servitude and five years' preventive detention.

Wrottesley for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The three statutory offences charged were larceny, 1895; stealing a purse, Manchester, 1901;

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and stealing a watch, Birmingham, 1905. There were other offences under Prevention of Crimes Act, 1871, for not reporting himself. The material time was between 1905—10, during which period there were no convictions, except for failure to report himself when on ticket-of-leave. The important period was between October, 1908, and January, 1910, and of this period no mention whatever was made in the summing up, nor did the Crown tender any evidence referable to that period. The prisoner did some work during that period, working on and off for fourteen months for a Mr. Frampton, and for a man, Rice, for about three weeks in October, 1908. Admittedly he has a bad record, but if that is always to stand in his way he can never escape. He called two men for whom he worked, namely, Frampton and Rice, and gives evidence of continuous employment of a kind. The case is stronger than *Baggott* (above, p. 30), or *Kelly*, 3 Cr. App. R. 248; 26 T. L. R. 196 (1909); in both of which cases the periods were considerably shorter than in this case.

Willes, for the Crown. There was evidence that he had been trying to get work; but even if some attempt were made to procure work, the jury are entitled to look at the circumstances of the primary conviction. That conviction was for housebreaking *in company with another man*, who was not arrested, shewing that appellant returned to his bad companions. The evidence of the first police officer shewed that on other occasions appellant has committed crime whilst actually in work. He is charged as a "habitual." It is not necessarily a defence that he has done some work. He committed this offence immediately after being warned by the detective Goldrick, the warning being given not very long before his trial.

Bray J.: The question here is whether or no there was sufficient evidence to convict the appellant as a habitual criminal. The evidence in support was mainly directed to the time which closed sixteen months before the conviction in question. As to that period there can be no question, for although he had done some work, there were no less than twenty-three previous convictions, so that the case started with strong evidence that he was a habitual criminal. We have to see whether

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he was so at the time he committed this offence. The offence was not a light one. His answer was: "I've been trying to get work." It is true he was employed on and off by Frampton for fourteen months; it is an important consideration, but, after all, it is not conclusive. All these matters were left to the jury. The evidence proved that he was undoubtedly going back to his old companions. The Recorder obviously considered he was a habitual criminal, and in the circumstances we do not think we ought to interfere with the conviction.

Appeal dismissed.

GEORGE WELLS. George Wells

Habitual criminal—It is a misdirection not to call the jury's attention to a considerable period of presumably honest life.

This was an appeal by leave of Walton J. against conviction as a habitual criminal.

Appellant was convicted on 7th April, 1910, at the West Kent Quarter Sessions, of two larcenies at the Chatham Barracks on March 4th, 1910, and of being a habitual criminal, and sentenced to five years' penal servitude and five years' preventive detention.

Roome for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was no substantial evidence to warrant conviction as a habitual criminal. Nine months elapsed between his liberation in June, 1909, from his last term and the commission of this offence. The only evidence as to his mode of living during that period was that of the appellant himself. He has been living at Camberwell with a woman, and her statement is to the effect that she had endeavoured to keep him out of trouble by buying fruit and fish and getting him to accompany her hawking. The police expressly said that there was no direct evidence of resumption of criminal modes of life.

The Chairman and the counsel for the prosecution misconceived the purpose and scope of the Prevention of Crime Act, 1908. There was no effort to prove anything but previous convictions.

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[Bray J.: There was the evidence of Superintendent Rhodes to the effect that he has been living since June last with this woman in Camberwell.]

Turner (above, p. 27), establishes that the prosecution must prove a dishonest and persistent criminal life up to the date of the commission of the crime on which the accused stands charged. Again, in *Kelly* (above, p. 32), the Lord Chief Justice said: "It does seem to us that a judge should direct the attention of the jury to any period of importance, any interval between the present and the last conviction which might affect their minds in deciding whether or not he is a habitual criminal." And the judgment in the case goes on to indicate that the Chairman did not sufficiently direct the minds of the jury to the mode of life of the prisoner during that interval; but the jury in that case were directed to the point much more than they were in the present case.

In cross-examination, appellant was asked whether he had not come out of prison the previous June on ticket-of-leave, and then received assistance from a Mr. Wheatley of St. Giles's Mission; and whether it was not while he was receiving assistance that he committed two larcenies at the Chatham Barracks, to wit, on the 4th March: one plain gold safety pin, a pair of gold sleeve-links, a tobacco box, and 15*s*. of the moneys of Denys Hammonds; and again on the 4th March a silver cigarette case, a gun-metal wrist watch, and a silver pencil case, the property of Geoffrey Hall. After that the cross-examination merely went to prove previous convictions.

It was prejudicial to appellant to indicate to the jury that he was the man who committed a robbery at the Worley Barracks in February, 1910. Superintendent Rhodes, who produced police reports and a photograph of appellant taken in prison, said that a robbery took place at Worley, and that the police had identified the photograph of appellant. The police reports were clearly inadmissible in evidence, and the Chairman told the jury that the photograph of the supposed thief at Worley greatly resembled appellant.

[Lord Coleridge J.: The inference appears to have been

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that as he was hawking fish and fruit, he was going to lead a dishonest life.]

An inference already deprecated by the Court once to-day.

A. J. Lawrie, for the Crown. The conviction as a habitual criminal is unsatisfactory, as the proper questions do not appear to have been left to the jury, and there is no doubt an attempt was made since prisoner was last released, to get work. In the circumstances I do not desire to press the conviction.

The LORD CHIEF JUSTICE. The question is whether the appellant was persistently leading a dishonest life. We do not say that there are not cases in which the jury may not be justified in drawing conclusions against the prisoner, even though he has been doing some work. But where there has been a substantial interval, added to the fact that the prisoner has done work, the Chairman must draw attention to it. Moreover, in this case, some of the evidence was not fairly admissible.

The conviction as a habitual criminal must be quashed, and the other sentence reduced to three years.

Conviction as a habitual criminal quashed and sentence reduced.

EDWIN RHODES.

Edwin Rhodes.

The Court will not, as a matter of course, grant an extension of time for appealing.

This was an appeal from the order of the Lord Chief Justice refusing extension of time for leave to appeal against conviction and sentence. Applicant was convicted of manslaughter, at the Leeds Assizes, on the 16th March, 1910, and sentenced by Mr. Commissioner Scrutton, K.C., to five years' penal servitude. He did not give notice of appeal till the 22nd April, and advanced the explanation that he had been advised not to appeal after sentence.

The LORD CHIEF JUSTICE: Ten days is fixed by the Act with

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power, except in cases involving death, to extend the time. Applications out of time are becoming more numerous. A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time—a month or more—elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.

Application dismissed.

Thomas Coles.

THOMAS COLES.

On an indictment for embezzlement, if prisoner admits that he has the sum charged, he cannot set up the defence of "general deficiency."

This was an appeal against conviction. Appellant was convicted on April 5th at the Glamorgan (Swansea) Quarter Sessions of embezzlement, and sentenced to six months' imprisonment with hard labour.

Griffith Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The indictment comprised two charges, embezzlement and larceny. Appellant was secretary of a small society called the Pigeon Homing Society. The members, nineteen in number, joined together to fly pigeons, the young ones from Weymouth, the older ones from France. The season was from spring to October. Prizes were awarded to the winners. For each competition there were three prizes, and seven competitions took place during the period. The subscription was one guinea, upon payment of which members were entitled to fly four birds. For extra birds sent members were charged at the rate of 6*d.* a bird. It is admitted by the prosecution that when a member won a prize he was at liberty to go on credit for extra birds, and at the end of the season a debit and credit account was struck, when probably a few shillings as balance would be paid or received. No one would know the amount of the prizes until 9th October, on which date a meeting was to be held. On 2nd October, two of the members were supposed to have examined the accounts. These two members met on that date and ascertained the expenditure. The appellant was secretary, but did

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not have to pay the money to the treasurer straight away. He made all necessary disbursements. There was a treasurer, but his duty was more or less nominal. There was one sum paid over to the treasurer, but all the disbursements were made by the secretary. There was a kind of "balance sheet," the true nature of which should have been clearly put to the jury. The heading of this sheet was on one side "Income," and on the other "Expenditure." The point of importance is whether the balance of 20*l.* 8*s.* 9*d.* represented actual cash or only the total income of the society. As a matter of fact the 20*l.* 8*s.* 9*d.* represented the *whole* of the income of the society if every penny had been paid up. The sum of 3*l.* 14*s.* 6*d.* was in the hands of the treasurer. The appellant was indicted for embezzling the difference between the above two sums, viz., 16*l.* 14*s.* 3*d.* If the amount 20*l.* 8*s.* 9*d.* represented the income of the society, and not cash in the hands of the appellant and the treasurer, the conviction could not stand. It is common ground that the prize winners had credit. Nearly every member was a winner. The amount to be allocated to prize-money could not have been fixed till the 9th October, so that when this alleged balance sheet was made out it is clear no one knew the amount in prizes each member had to receive, and his debit and credit could not therefore be adjusted. On 9th October, the members having this "balance sheet" in their hands, and seeing that the income came to 20*l.* 8*s.* 9*d.*, passed a resolution that 19*l.* should be devoted to prizes. The treasurer produced 3*l.* 14*s.* 6*d.*, and when asked where the balance was, said that that was all he had received from the appellant. The appellant, when asked about it, answered: "The money is perfectly safe, and if the members will only pay between now and Monday I shall pay it in." The prosecution hangs entirely on the fact that the witnesses swore that appellant's actual words were: "Safe in my house." The money was neither in hand nor in his house.

He told another member, Flower, on the Saturday or Sunday following the meeting of the 9th of October, that there was money outstanding.

[Lord Coleridge J.: But he decamped two days before the dinner that was to be held on the 11th December. There was no evidence to explain what he himself stated on the 9th October.]

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No, he had not decamped. He went elsewhere to seek work, leaving his furniture, wife and family in the locality. There was not an iota of evidence that he received a penny from that time onwards.

Six shillings was subsequently received from one of the members of the society, shewing at any rate that some money was not in hand on the 9th October.

[Lord Coleridge J.: The witnesses for the prosecution say that he said he had 16*l*. in his house. Is that not evidence on which the jury may act?]

That statement was made on 9th October when the statement of account called the balance sheet was produced. How could the money have been in his house if the prize-money had not even been settled? Between 9th October and the meeting in November appellant paid 14*s*. for the purchase of rings for birds. 2*l*. 10*s*. was due to himself as prize-winner

[Lord Coleridge J.: Why does he deny that he was the secretary of the society?]

Because his duties were not on the footing of those of an ordinary secretary. The summing up contains misdirection and non-direction. The whole of the summing up was confined to the alleged admission of the appellant. The defence was not fairly and fully put to the jury. They should have had put to them the true nature of the so-called "balance sheet." They were told the story that he was "going to collect the money and pay it back." He is not liable criminally for non-collection. No mention was made of the 2*l*. 10*s*. due as prize-money, and the sum of 6*s*. which was paid to the society subsequently. The fact that credit was given to prize-winners was evidence that he could not have had the 16*l*. 14*s*. 3*d*. in his house on the 9th October. The case for the prosecution stands or falls by his having that amount in his hands on the 9th October.

In the next place, the conviction cannot stand, because a general deficiency will not support an indictment for embezzlement.

[Lord Coleridge J.: This is not a case of general deficiency. You must shew he did not receive the 16*l*. 14*s*. 3*d*.

Bray J.: If the jury believed he did say that the money was safe in his house, that was an admission that he had received all these subscriptions.]

That sum was admittedly a balance; it is not a specific sum, nor is it made up of specific sums. The prosecution must give evidence of the receipt of specific sums. *Lloyd Jones*, 8 Carr. & Payne 288 (1838); *Chapman*, 1 Cox C. C. 47; 1 C. & K. 119 (1843).

Counsel for the Crown was not called upon.

The Lord Chief Justice: In this case Mr. Griffith Jones suggests misdirection, and miscarriage of justice because too much weight was attached to the evidence of the prosecution that appellant admitted he had 16*l*. 14*s*. 3*d*. "safe in his house." I quite agree that if the case had been put that appellant had merely received money on account, and not rendered proper accounts, it might be said to be only a case of general deficiency. But that is not the way the case was put for the prosecution. The case was put that the accounts were gone into, and further, that the appellant said he had 16*l*. odd at his house and would bring the money up upon the Monday following. Mr. Jones says there was some evidence that there was a sum of 14*s*. paid out by the appellant between 9th October and 9th December, and a sum of 6*s*. received by the society during that period, and that there was 2*l*. 10*s*. due to the appellant for prizes, all parts of the 16*l*. 14*s*. 3*d*. for which he was indicted. But that, if true, would merely reduce the amount alleged to have been embezzled to something under 16*l*. 14*s*. 3*d*. The Chairman did put the case for the defence. He directed the jury that the appellant did say that if the members paid up their subscriptions, he would pay the money over for prizes. The three witnesses for the prosecution denied that he said this; in substance, their answer is that the appellant said he would account for the money and produce it on the ensuing Monday. The jury were entitled to believe the appellant or the three witnesses for the prosecution.

Then again, the appellant disappeared two days before the money was to have been handed over.

In these circumstances we cannot see that the objection

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can be taken that this was a case of general deficiency and not embezzlement.

We are of opinion there was evidence to support the indictment, and therefore this appeal must be dismissed. Sentence may run from date of conviction.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JELF, MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, AND LORD COLERIDGE J.

ARTHUR THOMAS ELLIS.

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Arthur Thomas Ellis.

On the trial of indictments for fraud the rule that evidence of similar offences to that charged is only admissible to prove system in order to negative the defence of mistake or innocent intention (if either be in issue), must be strictly followed.

It is the duty of the judge to stop inadmissible questions put in cross-examination to the defendant, and, if they have been put, to caution the jury carefully against their influence.

In sect. 1 (*f*) *of* 61 & 62 *Vict.* c. 36, *the Criminal Evidence Act*, 1898, *the words "any question tending to show that he has committed . . . any offence . . . " do not only mean "with a view to show," but mean such questions as would naturally lead the jury to think defendant was charged with some other crime, and no such question can be isolated from others in cross-examination.*

In sect. 1 (*f*) (*ii*) *of that Act, it is not evidence of defendant's "good character" if he denies his guilt, but (generally) it is such evidence to call witnesses specifically to prove it or to cross-examine the Crown witnesses to that end.*

This was an appeal on grounds of law against conviction before the Recorder at the Central Criminal Court on March 17th, after a trial lasting five days. There were two indictments, one of which was not tried. The other contained six counts, on four of which appellant was found guilty; on the remaining two he was acquitted. Sentence was postponed, but appellant was not on bail.

The first count related to "fine old Dresden bust of a child on pedestal" and a pair of "pug dogs"; the second count referred to "Chelsea candelabra"; the third count referred to "an old Dresden scroll scent bottle"; the fourth to a pair of

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Worcester cups and saucers; the fifth to a "topaz box"; and the sixth to a china group, "Europa seated on a Bull." The charge in respect of all these counts was that appellant, instead of charging Mr. C. J. Dickins with the cost price and ten per cent. profit, as had been arranged between them, had extorted by falsely pretending that the cost price was more than it in fact was, very much larger sums than he was entitled to under the contract. He was found guilty on all but numbers two and three. The other indictment contained three counts. The first related to "a figure of the Countess Cozier of old Dresden porcelain" ("Cozier"); the second to "a group of two noblemen in Masonic costume dividing the globe;" and the third to "a figure of Countess Cozier and a figure of a gentleman holding her by the hand." This indictment charged appellant with having falsely described these articles and as having falsely sold them as genuine, and thereby obtained cheques and money by false pretences.

On April 21st and 22nd the appeal was argued before the Lord Chief Justice and Bray and Pickford JJ., who ordered that it should be re-argued before a full Court.

Reginald J. White for the appellant, who was not present. The defendant was an art dealer, and entered into an agreement with the late C. J. Dickins to sell certain articles to C. J. Dickins at cost price and ten per cent. profit. This agreement was not in dispute, nor was it in dispute that certain statements were in fact made by appellant to Dickins. The issue at the trial was solely whether these statements were true or false. It is submitted that questions were put to appellant in cross-examination which were directly contrary to sect. 1 (f) of the Criminal Evidence Act, 1898, in that they tended to shew the appellant to be guilty of other offences than that for which he was being tried, and that he was of bad character generally. Not only were inadmissible questions put, but the suggestions so made, though not proved, were left to the jury by the learned Recorder in the summing up. In short, the learned Recorder was wrong in law in permitting questions to be put to appellant in cross-examination for the purpose of shewing fraud of a different nature to that alleged in the indictment, and which formed the subject-matter of another in-

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dictment. Further, the learned Recorder misdirected the jury in that he charged them that certain matters put to appellant in cross-examination with regard to the genuineness of certain pieces of china afforded evidence of fraud on this indictment, and in that he omitted to put before the jury the evidence given by appellant that the figure of the Countess Cozier, of which photographs were put to appellant in cross-examination, was not the figure sold by appellant to Mr. Dickins.

With regard to the figure called the Countess Cozier, the cross-examination of appellant elicited that there was an entry in the stock book of a Dresden figure of a lady in crinoline and green cloak. Then the following question was put to appellant: "In your day book is this what the lady in crinoline has developed into—'a figure of Countess Cozier of fine old Dresden porcelain of exceptional quality in large crinoline, beautifully painted with detached bunch of flowers in gold trellis medallions, with long flowing train of green color on Louis XV. plain ormolu mount, £430'?" Then further on, the prosecution asked appellant, "Do you suggest that by that day book entry and the invoice which tallies with it, you were not representing to Mr. Dickins that that was the Countess Cozier, the well-known Dresden china piece?' Appellant answered that he so described the figure because Mr. Dickins himself told him that it was a figure of the Countess Cozier. Appellant simply treated it phonetically, and spelt it in his own way. The proper spelling was "Koessell." Appellant swore he did not know of the "Countess Koessell" as a famous piece of Dresden. That he asked Mr. Dickins: "Are you sure that is the same figure that was in your former collection?" (Mr. Dickins had sold his old collection in 1879, and begun to collect anew in 1899), to which Mr. Dickins replied: "Oh yes, I am quite positive; but let Emma have a look at it." Emma, the family nurse, replied: "Why, that is our old figure," and then Mr. Dickins said to him: "I am not going to say whether it is worth £500 or not, but I will give you £400 profit on it." That is how the defendant came to sell for £430 the figure he had purchased for £30 from Hoffman.

There was no charge in respect of this article, and therefore the only object of the cross-examination was to shew that appellant was passing off spurious china, and was a man of generally dishonest character. Later on in the cross-examination of appel-

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lant, a photograph alleged to be of the piece in question was handed up to the witness, and he was asked whether it was indeed a photograph of the Countess Cozier. He denied it. It appeared that Mr. Dickins, junior, made up the book of photographs in conjunction with the late C. J. Dickins. Then counsel for the appellant objected. Up to this point the evidence had been given without objection.

[Lord Coleridge J.: That does not make it admissible.]

It is submitted that though the objection was belated, the evidence is none the less inadmissible. If such evidence were admitted, there was nothing to shut out questions as to every case in the second indictment. The questions might have been allowable so long as they tended to shew what Hoffman's relations with appellant were as to the particular transaction with regard to which he was being tried. Questions as to the identity of the thing were inadmissible on a charge of false representation as to cost price.

Then again, in the summing up, the jury are charged on the evidence thus wrongly admitted, and the whole story of the "Countess Cozier" is put to them, the Recorder saying of the transaction: "If it was all right, if there was no fraud in it, it was a very fortunate piece of business"; and again, in directing them as to the photograph and pencil sketch of the figure alleged to have been sold to Dickins, and the figure previously sold by him in 1879 to Christies, respectively: "I dare say you know that there is a lot of fraud in these things"; and he goes on later to identify the "Countess Koessell" with the Countess Cozier which, having formerly figured in a Captain Warrener's collection, was given to Warrener's housekeeper, Mrs. Hoffman, who sold it through her husband to appellant.

Even if the evidence shewed system, then it could not be evidence on this charge, because there was no such issue before the jury, and no evidence of systematic false pretence could be admissible on the indictment.

[Bray J.: Is it not admissible on the intent to defraud?]

Macdonnell, 5 Cox C. C. 153 (1850), is in point. Serj. Parry, for the prosecution, was there proposing to call a witness to prove

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that the prisoner, who was indicted for threatening to accuse the prosecutor of an infamous crime in order to extort money, had two years previously made a similar charge against another person. Erle J. ruled such evidence inadmissible in a case the main question in which did not turn upon the intent with which the act was done, saying that in such a case as they had before them "if the prosecutor is believed, the intent is quite manifest, and therefore it is unnecessary to call other witnesses for the purpose of confirming it." The questions put to appellant merely proved general intent to defraud, they would not shew fraud in the transactions forming the ground of the indictment. They merely went to his credit.

L. Alverstone C. J. in *Bond*, 2 K. B. (1906) at 394; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; 54 W. R. 586; C. C. R.: "The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved."

[The Lord Chief Justice: That was to negative the defence of accident. There the cross-examination was not to credit.]

Even if the evidence was admissible it really proved nothing. If the appellant had been on his trial on these further allegations, it would have been the duty of the learned Recorder on this evidence to withdraw the case from the jury. The evidence should not, therefore, have been left to the jury in this case.

Bodkin (with him *Leycester*) for the Crown. There never was a suggestion of spuriousness in the cross-examination; the genuineness or otherwise of the "Countess Cozier" and the "Peter the Great and August the Strong" (described in the day book as "fine old Dresden group of two noblemen in Masonic costume, dividing the globe"), was the subject of another indictment which was not tried. The defendant was being fairly dealt with. In long cases like the present one, the onus shifts

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from side to side with great rapidity; counsel for appellant had given no indication where the onus lay on any issue other than the main issue; he had not told the Court what the real case was. The real question before the jury was: Was the defendant to be believed or his books? The summing up on the issues was accurate on the whole; in long cases full of complicated facts possibly the summing up does contain expressions which can be improved upon; but this is no ground of appeal. "Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced," *per* L. Alverstone C. J. in *Stoddart*, 2 Cr. App. R. at 246 (1909). Superficial inaccuracies in long cases where the substantial matters on which the jury is relying are put to them cannot amount to misdirection. The words in the summing up, "There is a lot of fraud in these things," was quite a general observation, and not *ad hoc;* the reference to Emma's testimony merely had reference to the credibility of the story. Counsel for the prisoner in the Court below had examined prisoner with a view to shewing that the relations of Hoffman and Ellis, so far as these appeared in Ellis's books, were honest. The cross-examination of the accused as to Hoffman was therefore properly and legitimately commenced.

As to count four, there was an alleged half profit arrangement between appellant and Hoffman. The truth of what appellant said outside his books therefore became of the utmost importance. This particular transaction was referred to in appellant's stock book as "pair of Worcester cups and saucers: sold for £110, cost price £70," then "£20, making £90." Underneath the £110 there was £70, which was apparently subtracted from the £110, leaving £40, then "half profit, £20." In the day book Dickins is charged £130 plus ten per cent. commission. Appellant's story was that a witness named Dopson had bought them from Ellis for £110, that Mr. Dickins afterwards wanted them, and that £20 more was paid to Dopson to surrender his

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bargain. The jury chose to disbelieve Dopson's story, and there was absolutely no record of this quaint story. Appellant was in flat contradiction with his own books. The issue, therefore, was: "Do you believe him or his books?"

The learned counsel for the prisoner in his opening speech to the jury said that there were certain knock-out entries and other transactions which would not appear in the books, and therefore in effect warned the jury that they must believe Ellis, and discount inferences to be drawn against him from his books. The prosecution was therefore entitled to test the prisoner's accuracy on all matters as to which he alleged half profit share basis. The prisoner said, referring to the Worcester cups and saucers, that the £70 was the cost price to the former owner and collector, Mrs. Hoffman's master, Captain Warrener. The books ought to have shewn the complete story.

[Lord Coleridge J.: The books do not shew fraud.]

No; this is the converse case. The prosecution was entitled on these books to cross-examine. There was no ulterior significance in the word "developed" in the question put to the appellant respecting the "lady in crinoline." Every question on this "Countess Koessel" or "Countess Cozier" transaction had been put before Mr. Elliott objected.

[Bray J.: Was it not your case in the second indictment that the description of this article in the invoice was false? From being "a lady in crinoline" in the stock book she becomes "a figure of Countess Cozier of fine old Dresden porcelain, &c." in the day book. You put it to the witness: "How does the figure of a lady unnamed in your stock book develop into Countess Koessel or Cozier when you come to invoice it to Mr. Dickins?" "Develop" surely means "developed into a fraudulent description." You are putting to him the misrepresentation that formed the subject of another charge. Did not that tend to prove that he had been guilty of that other fraud?]

The books were in issue. Counsel for appellant had said to the jury: "I warn you not to accept them against the defend-

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ant's story." Therefore we were entitled to cross-examine as to other entries.

[BRAY J.: You have reversed your case. You said at first that the books were true and all outside was false. But now you say the books are false.]

The mere fact that when one is cross-examining for an explanation of a particular transaction, one gets partly on the way to shewing there has been another fraud, does not destroy the relevancy of the questions to the particular explanation required, and the question, therefore, is not contrary to the Criminal Evidence Act, 1898. The difference between the cost price of the "Countess Koessel," £30, and the price to C. J. Dickins, £430, was explained by appellant saying he knew nothing of the value of the article in the world of art curio. He was then cross-examined to test his statement that he was an expert, and therefore questions as to the identity of the article represented in the photograph and rough drawing became germane to the issue. There is every difference between credit used as a synonym for character and credibility as a witness. He can be tested as to his credibility.

Appellant was cross-examined as to the article known as "Peter the Great and August the Strong" after the learned counsel had made his objection, and the learned Recorder had ruled the evidence upon transactions forming the subject of the second indictment admissible, merely to find out whether, if this other were really a half-share transaction with Max Woolman (that is a purchase in joint account with Woolman), Woolman got a share of the real difference which the books shewed.

The cross-examination was throughout to test his credibility. There is a fundamental difference between credibility and credit. See *Chitson*, (1909) 2 K. B. 945; 2 Cr. App. R. 325; 79 L. J. K. B. 10; 73 J. P. 491; 53 S. J. 746; 25 T. L. R. 818. If these books were before the jury for the purpose of being vouched for by the prosecution to shew frauds alleged in the indictment and vouched for by appellant as being only partial statements of the actual facts, then the prosecution was entitled to cross-examine on them, and upon the whole of the entries in them relative to Mr. Dickins.

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[Lord Coleridge J.: In *Chilson* there was no evidence that the other girl was under sixteen.]

There was no evidence adduced here that this other china was spurious. Moreover, the learned counsel for the defence, by examining as to other purchases by Mr. Dickins from the prisoner, as to which there was no suggestion of any fraud, and which were not the subject of any indictment, let in the whole of the books. He went through every item in order to shew that there were other transactions with Mr. Dickins that were not subject to the ten per cent. arrangement. If he examined on all the sales that were not impugned, the prosecution were also entitled to go through every item. He opened out by his discursive examination the whole of the entries.

[Bray J.: How do you keep within the Criminal Evidence Act if you assume they shew fraud other than that with which he is charged?]

The evidence adduced was relevant to an issue before the jury. See the judgment of Jelf J. in *Bond* (above, p. 45).

The learned Recorder's ruling was right because Mr Elliott raised the question before the jury of the prisoner's character for honest dealing with Mr. Dickins and as a trader in this business. The real line of the whole of the questions put by learned counsel for the prisoner was to shew that a young man fresh from school and comparatively inexperienced, could not have deceived an old experienced man like Mr. Dickins; and this, although in the questions the word "character" does not appear. Therefore even if the evidence did go to the full length, namely, tended to shew fraud, the prosecution was entitled to take advantage of it.

[Lord Coleridge J.: Could you have asked him about previous convictions?]

Yes; though of course had there been any, appellant's counsel would have been warned *sotto voce*.

The prosecution was not adducing evidence as to the prisoner's character generally, but as to his relations with Dickins. The

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evidence shewed a course of conduct as between himself and Dickins. See the judgment of Bray J. in *Bond*, above, p. 45. This is not a case of isolated acts, like burglaries, having no connection between them. A plan may be a plan which will carry out the object in various ways. If the victim of the plan is the same person, then the evidence must be whether the defendant intended to victimise that person. Then if, either by the invoicing up to more than ten per cent. on the cost price, or by exorbitant prices as in the "Koessel" transaction, he intended to effect his purpose, the prosecution is entitled to go into these other matters to shew that design. The reasoning in *Bond* merely goes to shew that you cannot put questions to shew instances as to dealings between prisoner and other persons than the particular person in question. The evidence adduced was another phase of the same scheme as that shewn by the indictment tried. The prosecution was in just the same position as if the defendant were being charged with the "Countess" fraud and the ten per cent. frauds on one indictment. The mere fact that the case is cut down in the indictment to a part only, rather by reason of the death of C. J. Dickins, does not preclude the prosecution from going into the evidence. The facts in *Bond's case* shewed intent in respect of different persons; therefore this is an *à fortiori* case. Intent is the gist of the offence, and therefore the evidence was admissible. *Blake* v. *Albion Life Assurance Society*, 4 Com. Pleas D. 94; 48 L. J. C. P. 169; 40 L. T. 211; 27 W. R. 321 (1878), per Grove J. The prosecution would be outflanked every time if such evidence were ruled inadmissible. In short, the case was that the defendant did not record in his books the real transactions that took place. The prosecution put it that his ingenious additions to his books could not exculpate him; and where his books were against him, the jury chose to believe the books, and not his story.

White, in reply. The objection to the evidence was taken late; but an objection is not too late even if it comes after verdict. (*Moore and another*, 61 L. J. M. C. 80; 66 L. T. 125; 40 W. R. 304; 17 Cox C. C. 458; 56 J. P. 345 (1892); C. C. R.)

The contention of Mr. Bodkin that the questions on the "Koessel" transaction were directed solely to the relations between Hoffman and Ellis is invalid. The questions went quite

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outside those relations. *Fisher,* (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 101; 26 T. L. R. 122: 3 Cr. App. R. 176, applies. The words of Channell J. at p. 153 are directly in point: "Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he also swindled in some other manner." *Birdseye,* 4 Carr. & Payne, 386 (1830), also shews that if the offences be distinct, and not part of one scheme or transaction, evidence of one offence is inadmissible on the trial of the prisoner for another offence. (Archbold, ed. 23, p. 308.) There must be a real *nexus.* All the evidence about Emma and what she said arises out of the prosecuting counsel's question: "Is this what the Lady in Crinoline has developed into?" That question ought not to have been put; it led on to other questions directed to shew spuriousness.

The learned Recorder understood the transaction as a case of fraud, and therefore the jury did too; it was left to them as fraud in the summing up. The evidence did not shew system; it merely went to credit. To get the protection of the Criminal Evidence Act appellant has not even to shew that he was cross-examined as to another crime; the Act says, sect. 1 (f), "or is of bad character." There was nothing in appellant's counsel's opening statement at the trial to shew that he was a man of good character generally; the speech was confined to the issues. Even if by his own wish and with the advice of experienced counsel he answers the question, he would still be entitled to the protection of the Act. If the answer were favourable to the prisoner the Court would no doubt exercise its discretion and say that no miscarriage of justice had taken place. All the statements made by Mr. Elliott in his opening speech relative to the youth of the prisoner were merely intended to shew that his system of book-keeping was not perfect. If he is examined to shew an innocent motive, that

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does not let in evidence of general character. Moreover, the offences could not have been tried together; they were entirely different; they could not be included in one indictment. The mere fact that he was (if he was) defrauding Dickins in two different ways, is no evidence of system.

Moreover, the offences suggested not having been proved, the learned Recorder should have withdrawn the evidence from the jury. *Girod*, per A. T. Lawrence J., 22 Times L. R. at p. 722; 70 J. P. 514 (1906); C. C. R.

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On May 12th the Court quashed the conviction.

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BRAY J. read the following judgment:—

In this case the appellant was indicted under six counts for obtaining moneys by false pretences from the late Mr. C. J. Dickins in respect of china sold by him to Mr. Dickins. It was alleged that all the articles referred to in the indictment had been sold by him to Mr. Dickins under an agreement that he was to charge Mr. Dickins the cost price plus ten per cent. profit or commission. The fraud alleged was that he had represented to Mr. Dickins that the cost was much in excess of the real cost, and that by this means he had obtained from Mr. Dickins much larger sums than he was entitled to. The jury acquitted him on counts 2 and 3, but convicted him on counts 1, 4, 5, and 6. The case was first argued before the Lord Chief Justice, Bray J., and Pickford J. The notice of appeal recited a number of grounds, but many were not argued at all. As to some of these the Court as then constituted felt no difficulty, but as to one of them, the Court considered it a point of so much importance and difficulty that it was advisable to have it argued before a Court of five judges, and accordingly it came on for hearing before a Court consisting of the Lord Chief Justice, Jelf, Bray, A. T. Lawrence, and Lord Coleridge JJ. This Court has already announced its decision that the appeal must be allowed, but stated that the reasons would be given later. We have now to give our reasons for our decision on all the points argued. We will deal first with those that we did not think it necessary to have argued before the larger Court. The first point raised by Mr. White, who appeared for the appellant and

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put his points most clearly and ably before us, related to the entries in the appellant's books. In all the six cases entries had been made in the books, which apparently shewed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as shewing the real costs, and if they were the real costs it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. His case was that they shewed only part of the cost, and that he had paid more for the articles than the figures shewn in the books, and that he had only charged Mr. Dickins the actual sums he had paid plus ten per cent. Mr. White urged that by their finding on counts 2 and 3 the jury had destroyed the presumption on which the prosecution had rested their case, that they had found in those two cases that the entries in the books did not shew the whole cost, and that if they did not shew the whole cost with regard to the articles mentioned in counts 2 and 3, there was no presumption that they shewed the whole cost of the articles mentioned in the remaining counts. We are of opinion that this argument is not sound. When the evidence is looked at it appears that there were good reasons why the jury should have accepted the appellant's explanation in the two cases and have rejected it in the others. The fact that there was a good explanation in the two cases would no doubt tend to weaken the presumption in the others, but would not destroy it. It was for the jury to decide the strength of the presumption. The next point was that evidence as to certain civil proceedings which had been taken by the executors of the late Mr. Dickins against the appellant was wrongly admitted. It appeared that before any criminal proceedings had been taken the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. Evidence was given on the part of the prosecution that the case came on for trial, that the appellant was present on the first day, but not subsequently, that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf, and the verdict passed for the plaintiffs with large damages. It

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was further shewn that after the first day the appellant had gone abroad, and had remained there till after the criminal proceedings were started. It appears to us that this evidence was admissible as shewing the conduct of the appellant when the charges were made against him. It is, as a rule, admissible to shew what is the conduct of a prisoner when he is charged with the offence alleged on the indictment. If he denies the charge, it is evidence in his favour; if he is silent it may be evidence against him; if he admits it, it will be strong evidence against him. In this case it was suggested by the prosecution that his conduct in leaving the country instead of going into the witness-box to deny the charges was strong evidence against him. We are clearly of opinion that this conduct of his was evidence against him and properly admissible. It was none the less admissible because the charges of fraud were first made in civil proceedings. The value of this evidence was, of course, for the jury. It does not clearly appear that the prosecution put in all the proceedings. They would not, in our opinion, be entitled to have the part of the statement of claim which contained the other charges read to the jury, but that part was not read. It did appear what the verdict of the jury was, but that was sure to come out, and no objection was made. It did also appear that Grantham J., who tried the action, had ordered the documents to be impounded. This, no doubt, should not have been stated but no objection was taken, and the matter is not one of sufficient importance in our opinion to justify an appeal. The real importance of the evidence given was the conduct of the appellant, and that we hold to have been clearly admissible.

We now come to the points argued before the larger Court. It was contended on the part of the appellant "that questions had been put to him in cross-examination tending to shew that he had committed an offence other than that wherewith he was then charged" in violation of the provision in sect. 1 (f) of the Criminal Evidence Act, 1898, and that the appellant had been wrongly required to answer such questions, and further, that the Recorder had wrongly directed the jury in his summing up that the evidence so given was relevant evidence which should be considered by them in forming their opinion as to whether the appellant was guilty of the offences charged. It appears that there was a second indictment, under which the appellant

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was charged with further frauds, which included the following:— (a) That he had obtained money from Mr. Dickins by falsely pretending that a certain china figure, described in an invoice sent to Mr. Dickins on July 17th, 1900, as a figure of Countess Cozier, was a genuine piece of fine old Dresden china, and that he had acquired it on July 16th, 1898, as a genuine piece of fine old Dresden china. (b) That he had committed a similar fraud by falsely representing that a certain china group, described in an invoice dated December 30th, 1902, as a fine old Dresden group of two noblemen in Masonic costume dividing the globe, was a piece of genuine fine old Dresden china. This piece of china was referred to at the trial as a group of Peter the Great and Augustus the Strong pushing the world. The indictment was not, of course, before the jury, except indirectly, in the argument as hereinafter stated, and it is only now referred to as explaining the cross-examination. For the purpose of our judgment it is quite immaterial whether these frauds had been made the subject of another indictment or not. It was argued by Mr. White, the appellant's counsel, that questions were put to the defendant in cross-examination tending to shew that the defendant had committed these two frauds. It will be convenient to consider, first, what is the meaning of the words of the statute—"Any evidence tending to show that he has committed," &c., an offence. It is plain that it must include many more questions than the simple question whether the prisoner has committed a particular offence. It is also plain that whether the question "tends to shew" cannot be decided by looking merely at a single question Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to shew that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not "With a view to shew" they are "tend to shew." Moreover, if they do so tend it is quite immaterial whether the evidence would be admissible or the question ad-

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missible on other grounds. As we read the statute, when a prisoner is charged with offence A., questions tending to prove offence B. are not to be asked unless proof of offence B. is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind. This disposes also of the proposition that the questions were admissible as going to the general credit of the witness. Nothing goes more to the general credit of a witness than a previous conviction; but no question tending to prove this can be asked. We will now refer to the questions which were put in the Countess Cozier case in order to see whether they come within our definition of the words "tending to shew." They are questions 2,056 to 2,207. On examination of these questions it will be found that they are directed to prove the allegations necessary to shew that the appellant had committed this fraud. Questions 2,056 to 2,074 are directed to proving by means of entries in his own books that he bought this Countess Cozier from Hoffman on July 16th under the description "Figure of a Lady in crinoline green cloak" for £30, and sold it the same day to Mr. Dickins for £430 under a much more elaborate description. This suggested a fraud. Then comes question 2,076. "*Q.*—In your day book is this what the lady in crinoline has developed into: A figure of Countess Cozier of fine old Dresden porcelain of exceptional quality in large crinoline beautifully painted with detached bunch of flowers in gold trellis medallion with long flowing train of green colour on Louis XV. plain ormolu mount, £430? *Q.* 2,077.—The figure of Countess Cozier is well known in Dresden china circles, is it not? It is a well-known and valuable piece. *Q.* 2,081.—Do you suggest that by that day book entry and the invoice which tallies exactly with it you were not representing to Mr. Dickins that that was the Countess Cozier, the well-known Dresden china piece?" Now what is the meaning of these questions? What would they convey to a jury? Surely that he had bought a piece of china of little value from Hoffman for £30 and had sold it to Mr. Dickins on a representation that it was the well-known Dresden china figure of Countess Cozier, the very false pretence charged in the second indictment. This line of cross-examination is followed up:—"*Q.* 2,088.—Do you tell the jury that you before that ate, July, 1900, did not know of the Countess Cozier as

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a very important piece of Dresden china?" And when the appellant denied this there come a number of questions, 2,089 to 2,097, directed to shew that the appellant was an expert, and must therefore have known of the existence of this well-known valuable piece of china, and that the article he sold was not that piece. *Questions* 2,103 to 2,113 are directed to shew that Hoffman, from whom he bought this piece, is also an expert, and would never have sold such a valuable piece of china if it were genuine for £30. We come now to *Q.* 2,170. "*Q.*—This is a photograph, is it not, of the piece that you sold for £430?" It was at this point that Mr. Elliott interposed with an objection that the cross-examination was irrelevant, and that it related to a fraud not in the indictment. It is most important to observe the answers of the Recorder to this objection. Mr. Elliott.—What possible bearing it has on any of the transactions named in the indictment I do not know. The Recorder.—It is cross-examination for the purpose of suggesting to the jury that there has been fraud in cases other than those set out in the indictment." This seems to us to make it quite clear how those questions were interpreted at the time, viz., as tending to shew that the appellant had committed another fraud in the sale of this Countess Cozier to Mr. Dickins for £430. Applying the test we have indicated—viz., would these questions reasonably lead a jury to believe that it was being imputed to the appellant that he had committed this other fraud?—our answer must be that a jury would quite reasonably and properly take this same view. The objection was overruled by the Recorder, and the cross-examination was allowed to proceed, and the appellant was asked to admit statements which Mr. Alfred Dickins had made in the witness-box at Bow Street when he was giving evidence in support of the charge in the second indictment, and the photograph and a pencil sketch, both of which have been put in evidence at Bow Street, were handed to the jury to shew that the appellant's explanation must be untrue. So much for the Countess Cozier fraud. *Questions* 2,208 to 2,255 relate to the Peter the Great and Augustus the Strong piece of china. It is unnecessary to go through these questions in detail. They are directed to shew by means of entries in his books that the appellant had bought the article for £30 or perhaps £60 from Woolman and had resold it to Mr. Dickins for £440. Reading these ques-

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tions and bearing in mind the questions put with reference to the Countess Cozier fraud, we come to the conclusion that these also tended to shew that the appellant had committed another offence.

Now, if it be established, as we think it has been, that these questions or some of them tended to shew that the appellant had committed another offence, the statute provides that they shall not be asked or answered unless—(1) The proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is there charged, or (2) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character. We need not refer to the other cases in which the statute provides that such questions may be asked, as it was not suggested they were applicable here. Dealing first with (1)—Was the proof that he had committed the Countess Cozier or Peter the Great frauds admissible evidence to prove the frauds with which he was then charged? In other words, could evidence of the frauds have been given by the prosecution? It was argued by Mr. Bodkin that the judgments in *Rex* v. *Bond* (above, p. 45), supported his proposition. We think they shew the contrary. On p. 394 (2 K. B.) Lord Alverstone says:—"The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved." Ridley J. agreed with this judgment, and Kennedy L. J., on p. 397, and Bray J., on p. 415, agree with the principle so enunciated by Lord Alverstone, so that four of the seven judges (a majority) laid down this principle; but when the other judgments are referred to it will be seen that they differ not so much as to the principle, but as to the application of the principle to the facts of that case. In our opinion the law on this subject is laid down with perfect accuracy by Channell J. in *Rex* v. *Fisher*, (1910) 1 K. B. p. 549. He says, giving the judgment of the Court of Criminal Appeal (Lord Alverstone C. J., Channell and Lord Coleridge JJ.):—"In other words, when-

ever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud." Then, applying these principles to the case he was dealing with, where the prisoner was charged with obtaining a pony and cart by making certain statements, he proceeded:—"The falsity of these statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is as regards proof different from any other offence, and if a man is charged with swindling in a particular manner his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other case was inadmissible in this case because it was not relevant to prove the particular fraud for which he is being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same methods, then the evidence would be admissible."

Applying these principles to the present case, we are of opinion that proof that the defendant had committed the Countess Cozier or the Peter the Great frauds is not admissible evidence that he was guilty of the frauds with which he was charged. As we have already pointed out, the frauds with which the defendant is charged were making false representations as to the cost price of the article, and so obtaining from Mr. Dickins more than the cost plus ten per cent. In the Countess Cozier and Peter the Great cases there had been no agreement by the defendant to charge only cost plus ten per cent. The frauds were in representing the articles to be genuine old Dresden china when they were not so. The transactions were entirely distinct. The frauds were not of a similar character. There was no systematic course of swindling by the same methods. It was argued by Mr. Bodkin that there was some connection between one of the six cases—viz., the Worcester cups case mentioned

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in count 4—and the Countess Cozier frauds, because in each case the article had been originally bought from Hoffman, and because in each case the entries in the books shewed payments to Hoffman. When the evidence is carefully looked at it will be seen that it is a fallacy to say that there was any connection between the two transactions. The prosecution were affirming, not denying, the entries in the books of payment to Hoffman, and the defendant was not suggesting any further payments to Hoffman, but to a different person altogether named Dopson. But, however that may be, the statute says that the test is to be whether the proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence charged. We come now to the second ground on which it was said that these questions might be properly put. Mr. Bodkin suggested that Mr. Elliott had in his opening speech to the jury endeavoured to establish the appellant's general good character. We do not think that this was so, but, if it were so, that is not within the statute; he must have asked questions of the witnesses for the prosecution, or he must have given evidence with a view to establish the appellant's good character. It was said that in the examination-in-chief of the appellant Mr. Elliott had asked questions relating to his purchase of this business, to his general relations with Mr. Dickins, and to other transactions under the cost, plus ten per cent. agreement. In our opinion, it would not be correct to say that the appellant had given evidence of his own good character. It may or may not have been relevant to go into other sales on the cost price plus ten per cent., basis. Mr. Bodkin thought it was not and objected, and Mr. Elliott did not further pursue that line of examination, but its object was not to set up his good character, it was to negative fraud. In our opinion, if we were to give the slightest colour to the idea that a general examination as to the surrounding circumstances was such evidence of good character as to entitle the prosecution to prove or to cross-examine as to other offences or convictions, we should deprive the prisoner of the protection which the statute has given him. Subsection (2) was not intended to apply to a case like this. It was intended to apply to cases where witnesses to character were called, or where evidence of the good character of the prisoner was sought to be elicited from the witnesses for the prosecution.

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In civil actions evidence of good character is not as a rule admissible. It is admissible in criminal cases, and it is to this class of evidence that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation. The evidence given by the appellant here in examination-in-chief could not possibly have been objected to in a civil action as being "evidence of good character." It is to be observed that it never was suggested for a moment at the trial that the appellant had given evidence of good character, nor was it suggested by Mr. Bodkin on the first argument of this case. He said the point had occurred to him from reading Mr. Elliott's opening, but this, as we have pointed out, is not within the subsection. Now these are the only two grounds on which the statute, so far as it is applicable to the case now under consideration, permits cross-examination of the prisoner as to the commission of other offences. They both fail in our opinion, and it follows that the questions put in cross-examination were not admissible. But it was said that Mr. Elliott's objection came too late. Now it is true that he might have objected earlier, and no doubt this Court must be careful in allowing appeals on the ground of the reception of evidence that ought not to have been admitted when no objection has been made at the trial by the prisoner's counsel. Here, however, the objection was taken, though not at the earliest opportunity. It was argued on its merits and overruled, and the jury were informed not only when the objection was overruled, but afterwards in the summing up that this evidence was relevant. No one was misled in the slightest degree by any delay in making the objection, and it would work a grave injustice if we were to refuse to allow the appeal here on the ground of some possible mistake on the part of the appellant's counsel. But there is another reason. The statute provides that the prisoner shall not be asked, and if asked shall not be required to answer these questions. In our opinion these words were intended to afford a double protection to the prisoner. The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more objection is made to it by

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the prisoner's counsel the stronger to their minds becomes that assumption. It is most damaging to the prisoner's case for his counsel to get up and argue that a question is inadmissible, because it tends to shew that the prisoner has committed another crime. In this case, in order to make his objection clear, Mr. Elliott was obliged to tell the Recorder in the hearing of the jury that there was another charge pending against the appellant, which was contained in another indictment. This of itself unless removed by some clear statement from the Recorder that they must dismiss the question from their minds, must prejudice the jury. That is the reason in our opinion why the statute forbade the question even being asked. In our opinion it is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds. There being, therefore, in our opinion a clear misreception of evidence, it would have been unnecessary to consider whether there was also a misdirection in the summing up but for the fact that it was argued lastly that there had been no miscarriage of justice. This Court has laid down quite clearly the rule to be applied in cases of misreception of evidence or misdirection in law. It is stated by Channell J. in *Rex* v. *Fisher* (above, p. 51) in these words:—"In the circumstances of this case, we cannot come to any other conclusion but that the jury may have been influenced by the evidence of other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court the conviction cannot stand." Ought we to say here that the jury may have been influenced by those questions and answers? A large part of the summing up was devoted to the stories of the Countess Cozier and Peter the Great frauds, whereas according to our view of the law the jury should have been told to dismiss these two matters from their consideration. The issue with regard to the charges in the indictment was a perfectly clear one. It was this: Were the entries in the defendant's books to be taken to shew the whole cost or did the defendant pay other sums? In other words, what credit was to be given to the defendant's evidence? Now the evidence as to these two other frauds was put before the jury as matter

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which they ought to take into consideration when they were deciding as to what credit should be given to the defendant's evidence. It is quite clear from the summing up that the jury were invited to consider whether these two cases were not very damaging to the defendant's credit, and that the jury could hardly have failed to draw the inference hostile to the defendant on the point. We feel bound, therefore, to say not only that the jury may have been influenced, but that they must have been influenced. On these grounds the Court is of opinion that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for Appellant—*Julius A. White.*

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE COLERIDGE.

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William Stutter.

WILLIAM STUTTER.

Severity of sentence.

Disparity between the sentences of co-prisoners is not necessarily a ground for reducing sentence.

Appellant was convicted on 7th April, 1910, at the Hants Quarter Sessions of stealing two odd boots in conjunction with one Henry Smith, and sentenced to five years' penal servitude.

W. Blake Odgers, jun., for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Application was made on May 9th for leave to call two further witnesses, on the ground that the evidence of identification was weak, appellant's identity resting on the evidence of a boy who was in the shop whence the boots were stolen. The Court allowed the application, and the proofs of the witnesses were submitted to the registrar. But the appeal against conviction must be abandoned.

My submission is that the sentence was excessive. The offence was of a very trivial nature. Smith pleaded guilty, and was sentenced to a term of only one month; appellant pleaded not guilty, and was sentenced to no less than five years' penal servitude. This great disparity is unjustifiable. Appellant is entitled to some consideration for a fairly honest term of years before his conviction for felony in October, 1906, when he was sentenced to three years' penal servitude. There is absolutely no suggestion of any aiding or abetting, and this, taken with the great disparity in the two sentences, and his mode of life before October, 1906, is ground for saying the sentence was excessive.

Gerard Sanders, for the Crown, was not called upon.

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The LORD CHIEF JUSTICE: This case brings into relief the necessity for taking care as to applications for leave to call further evidence.

The appellant, having been identified as being at the shop by a boy in the shop, said he was not there at all. He desired to call his sister and another witness to prove an *alibi*. He induced this Court to accede to that wish in order that there might not be any suggestion of miscarriage of justice. The sister and her husband gave proofs of their evidence, which were submitted to the registrar. They said the appellant's statement was quite untrue, that they had not seen him for eight years, and that they were not there at all. Therefore the appeal on the facts wholly fails.

As to the sentence of five years' penal servitude, I have already said we do not deal by mere comparison in ascertaining whether a sentence is excessive, unless the circumstances are such as to make the sentence unfair in itself. In view of his previous career, the Court was justified in inflicting a very severe sentence, although I do not say that it is one which we should have inflicted. He had been convicted of stealing a purse, and for failure to report himself, and had been out of prison only a fortnight. We cannot say, therefore, that the Chairman went wrong on any ground of principle.

Appeal dismissed.

STEPHEN NORTON (*a*).

Stephen Norton.

Whether the contents of a statement made in the hearing of a defendant are admissible in evidence against him depends upon the question whether it was of such a character that he might reasonably be expected to say something upon it, and then it must be left to the jury to decide whether he did or did not admit the truth of such statement or statements. The judge must not allow the contents of the statement to go to the jury unless he is satisfied that there is evidence that defendant acknowledged something therein.

Louis Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted on

(*a*) See p. 7, above.

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the 17th March, 1910, at the Leeds Assizes, before Mr. Commissioner Scrutton, K.C., of carnal knowledge of a girl under thirteen, and sentenced to ten years' penal servitude. At the first trial at Leeds before Walton J. the jury disagreed. The appeal is from the subsequent trial at the Leeds Winter Assizes, and is based on the ground of the learned Commissioner's misdirection and non-direction of the jury. The little girl, Madge Truman, aged six and a half years, was not called at the second trial as a witness. The charge was that appellant had violated the child on the night of August 6th. On the morning of 7th August she returned to her home from the place, being taken to her mother by a man named Travis. Everyone in the village of Smithies, where appellant and the child lived, was suspicious of appellant; and the girl charged him with the offence in somewhat dramatic circumstances, but he immediately and emphatically denied the charge made against him. The only evidence produced to prove the incident was that of the girl's mother. It is submitted that the girl's mother cannot prove the truth of the statement that she heard the girl make. Her evidence is only admissible to shew that a charge was made and that prisoner denied it. The learned Commissioner ought to have told the jury that it was not evidence against the appellant. He failed to warn the jury that this evidence was no evidence of the truth of the girl's charge. If the girl had been called, the evidence would only have been confirmatory evidence of the girl's consistency of conduct. *Lillyman*, (1896) 2 Q. B. 167; 65 L. J. M. C. 195; 18 Cox C. C. 346; 60 J. P. 536; 74 L. T. 730; C. C. R.; *Osborne*, (1905) 1 K. B. 551; 74 L. J. K. B. 311; 92 L. T. 393; 53 W. R. 494; 69 J. P. 189; 21 T. L. R. 288; C. C. R. Evidence of statements made in the presence of defendant are admissible evidence, but only as leading up to what the prisoner said in answer to the charge.

The learned Commissioner misdirected in the following passage: "Maggie Truman comes back from that awful night at 9 o'clock the next morning. Somebody is seen trying to get over the wall of that field, and Travis runs up and brings her down to her mother. The prisoner is brought into the house, and then there comes the dramatic scene which is so dramatic that one is afraid that it takes away one's power of accurately estimating it, in which the man solemnly swears that he did nothing to the

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little girl, and the little girl twice or thrice points at him and says, 'Stevie Norton, you did it.' Gentlemen, you must consider that remark carefully. It is for you entirely, and anything I say as to fact you are to disregard if it does not agree with your own views. You are the judges of fact and not I. You must consider this. Do you think, first of all, that after what she had gone through that night the little girl was in a condition to remember accurately? As to that, probably most of you have some experience yourselves of concussions, or you know of cases. You have heard the doctor say that he thinks that very often the person recovering from concussion would accurately remember, and of course you will take that into account. One of the things you have to consider is, do you think this little girl, suffering from concussion, would accurately remember what happened before the concussion. Another thing you must take into account, as Mr. Mellor has very properly said to you, is this: these little girls easily take up suggestions. The village was suspicious for some reason, which does not appear, of the prisoner. If the suggestion was made by anyone, before this prisoner came into the house, to the little girl such as 'Was it Stevie Norton?' it is possible (it is for you to say) that she may have got into her head that it was Stevie Norton when it was not. You must take into account those two considerations, the possibility of loss of memory through concussion, and the possibility of a suggestion to a little child by other people suspecting Stevie Norton, and you will have to consider the effect of that; but, gentlemen, at any rate the fact that the little girl did say so renders it necessary to consider very carefully what evidence is tendered on behalf of Stephen Norton." This incident is presented to the jury as if it were the crux of the case. The effect is to put the case before the jury in a false perspective, and to leave what was in reality the whole case for the Crown as if it was merely necessary corroboration of the girl's statement, a statement which was in fact not made on oath. My submission is that the learned Commissioner ought first to have been most careful to warn the jury that the mother's evidence reporting the charge made by the girl was in no sense evidence of the truth of the charge. The dramatic scene ought to have been left as carrying the case no further, or as telling in the prisoner's favour if anything. The jury must have been misled; they based their finding on what was

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not evidence for the prosecution. The summing up contains this misdirection in almost the concluding passage: "Gentlemen, I think that I have told you practically all the evidence. If you believe he was not at 'The Woodman' and if you believe that he did make that statement about the 'Prince of Wales,' you have then got him telling lies to conceal where he was, and you will probably think, if that is the position, that confirms very much what the little girl says, because if he were the guilty man he would be very likely to try and explain where he was at a material time by making some statement which must have been untrue, because if he were the guilty man, he was in the wheatfield and not in some other place. Gentlemen, you have to consider all these matters and you have to consider what weight is to be attached to the statement of the little girl. . . ." The authorities on this point are *Bromhead*, 71 J. P. 103 (1906); C. C. R.; *George Thompson*, (1910) 1 K. B. 640; 4 Cr. App. R. 45; 79 L. J. K. B. 321; 26 T. L. R. 252. Taylor on Evidence, § 816: "In all these cases [of silence or non-denial by the party] it must be distinctly remembered that the statement made in the party's presence or hearing is not evidence against him, but his own conduct in consequence of such statement is the sole evidence."

As to the proviso to s. 4 of the Criminal Appeal Act, it is true that there is no shorthand note of counsels' speeches; but Mr. Waddy, who appeared for the Crown, opened this incident to the jury with the greatest possible force, and he opened it as if the girl were certainly going to be called. His opening proceeded as if the other facts—for example, that the prisoner was seen coming away from the spot some time later—were corroborative of the girl's statement. Indeed, the opening may even have misled the learned Commissioner into summing up in the way he did. Where a substantial misdirection is so substantial as to be the dominating feature of the summing up, you cannot speculate as to what the jury might have found if the case had been properly put to them. This Court cannot be the jury in the case. The jury must have come to their conclusion independently of this evidence; unless the Crown can shew this, the appeal must succeed. *Dyson*, (1908) 2 K. B. 454; 1 Cr. App. R. 13; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; *George Coleman*. 24 T. L. R. 798; 72 J. P.

425, Alverstone L.C.J. at p. 427: "As we think we cannot say the verdict would have stood if no mistake had been made, the appeal will be allowed, and the appellant discharged."

Waddy, for the Crown. At the first trial, Mr. Coutts Trotter, who was for the Crown, considering the age of the child, thought it undesirable to call the child. The Court said it ought to be called. The child was called. In my opening, on the second trial, I indicated that the girl was of too tender an age to be put into the box, concurring in the view which counsel for the Crown had taken on the first hearing, but in view of the fact that the child had been once called, I offered to call her again if the defence so desired. Mr. Mellor said he would take no responsibility one way or the other, and the Bench expressed no view. The child was not called before the magistrates. I do not assent to the proposition that this conversation was made the dominant note of the case, nor that it was put in opening with the emphasis suggested.

As to the statement of the little girl, the direction of which as proof of the truth of the charge is the ground of this appeal, if such statement had not been given in evidence, or if the jury had been told that they must disregard the evidence, there was still circumstantial evidence enough to prove appellant was the guilty man. As to the effect of an improper direction upon the minds of the jury, my submission is that if the judgments in *Dyson* (above, p. 68), and *Makin* v. *A.-G. of N. S. W.*, (1894) A. C. 57; 63 L. J. P. C. 41; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148; P. C., are pressed too far, the proviso to s. 4 of the Criminal Appeal Act is left without meaning. I rely upon a passage in the judgment in *Stoddart,* 2 Cr. App. R. at p. 245; 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612: "We think it is open to consideration whether the word 'must' [in *Dyson*] is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict." This I contend to be the true manner of looking at the proviso to sub-s. 1 of s. 4 of the Criminal Appeal Act. See *Cohen,* 2 Cr. App. R. 197; 73 J. P. 352 (1909).

The view I invite the Court to take is that appellant's own conduct and statements, and the coincidences as to time, taken all together, amounted to such evidence as that the jury

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would have convicted in any event. The facts shewed that at 8.55 p.m. on the night of the crime the child left the house of Mrs. Huscroft, whither she had been from her own home to purchase tripe. By a coincidence the appellant is seen standing opposite Bell Gate, which stands on the side of the main road opposite to and not many yards distant from the house of Mrs. Huscroft, and which leads into the wheatfield where the outrage was committed. Appellant recollects nothing of his movements over the critical time, though he is perfectly clear up to about 9 o'clock. The next that was seen of him was at 11.30 p.m. on that same night by two men, Truman (father of the girl) and Turton. Appellant professes to be able to account for his movements after about 9.30, immediately on coming to his senses at the Smithies School. No one saw him at this time; he says he then went to the "Woodman" Inn, and sat there till closing time. Two witnesses gave evidence that this statement was untrue, and he could call no one to prove he had been in the inn at that time. He gives a false account of his movements after 9.40. He could surely have rendered a true account between 9 and 9.40; he says he was during that time too drunk to recall anything. Vomit was found on his trouser legs, but no point hostile to appellant was made from this fact, although vomit was found in the spot where the outrage was committed. On meeting Turton and Truman at 11.30 p.m. an incident occurred which was put to the jury, namely, that as soon as appellant learnt that Truman was the girl's father, he broke off his conversation. Then again there is the evidence of Samuel Tyass, who noticed that appellant had sandy soil on his breeches; standing by itself the incident may be unimportant, but the appellant violently denied there was any soil on his clothing. To Tyass, who was the first person he met according to his own story, he volunteers a statement which will cover exactly the time from 9 to 11. According to his own story, he was too drunk to recall anything; but at the interview with Tyass he volunteers a statement at the critical time, and that at a time when, had he been innocent, he ought not to have known what had taken place. There was as yet no suspicion attaching to him; why then did he make such a statement te Tyass merely upon learning from Tyass that the child had disappeared? Again, when seen by Mrs. Scorer at 1 a.m. on the Saturday morning, the evidence of Mrs. Scorer shews that

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he was seeking to dissociate his movements from the Bell Gate when he ought not to have known that that spot was in any way material. What was there to put him on notice or knowledge?

Furthermore, the conduct of appellant when his attention was first called to the return of the child was not that of an innocent man. He sees the girl struggling to get home, and instead of doing anything, he goes to his mother, and then looks for Tyass. He had not, of course, seen Travis, who afterwards walked across and brought the child in. Then, on coming out of the house, he walks past Travis and the child without even going to see the child, past the place of the outrage, and says, "That's the place where they've had her," and that at a time when no one knew she had been violated. After which he proceeds with his imaginary search for the persons who had committed the outrage twelve hours previously.

There was also evidence as to the sponging or cleaning by appellant of his clothes. It is true that there was no blood on his clothes, whereas there was a lot on the girl, and that puzzled the jury at the first trial, but the learned Commissioner on the second trial pointed that but to the jury, because a juryman at the first trial had asked whether any blood was on the appellant's clothing.

Then there is appellant's own explanation of his being in the field. He says he went there to relieve nature. Turton proves that appellant went quite across the field, and that next morning he went himself and saw a track in the dewy grass.

I submit that the distinction relied upon by the appellant is artificial, and that the statement was evidence. If extraneous circumstances had been included or anything outside the girl's bare statement, I might be in difficulties.

Cases such as *Osborn* and *Lillyman* are not in point; for there is here no question of consistency of conduct or consent. It was merely a statement made in the presence of the accused.

Hoare, in reply. At the first trial the girl's evidence, the whole of the evidence as to the circumstances, the prisoner's own evidence, and that of the prosecution to rebut it, and to prove that appellant was saying what was untrue, was all before the jury, but they were unable to agree. In face of that, can your

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Lordships say if this case had been laid correctly before them, the jury would have found the appellant guilty? Having regard to this abortive trial, can you say a verdict of not guilty would have been a perverse verdict? That is what your Lordships would be saying if you decide against the appellant.

The Lord Chief Justice: The Court is of opinion that it cannot act on the proviso. The fact of there being a misdirection cannot be properly disputed, and the Court allows the appeal. We think it right to give our decision to-day, but we will give a formal judgment later. The appellant is remanded in custody to be tried at Leeds on the other indictment, as in the case of *Sovoski*, 1 Cr. App. R. 100; 72 J. P. 435 (1908).

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Pickford J.: The appellant in this case was tried at the Leeds Assizes on 17th March last before Scrutton J., then sitting as a Commissioner of Assize, on a charge of carnally knowing a girl called Marjory Truman, she being then under the age of thirteen years.

He was convicted and sentenced to ten years' penal servitude, and now appeals against that conviction on the ground that the learned Commissioner misdirected the jury as to the effect of certain evidence given on the trial.

The evidence against the prisoner was entirely circumstantial, with the exception of that relating to the statements of the girl and the answers of the prisoner, to which reference is made below.

The child was not called at the trial, but evidence was given of statements made by her in the presence of the prisoner, and his answers to them, and it is in relation to this evidence that the question of misdirection arises.

The evidence was to the effect that, on being asked by the prisoner who had done it, she said "you," and on being asked by another person, she said "Stevie Norton," and pointed to the prisoner; that the prisoner said, "No, Madge, you are mistaken," and that then she said, "You have done it, Stephen Norton," and pointed to him again. According to one witness, he then lifted his arms and said, "If I have done it I hope the Lord will strike me dead," and according to another witness, "If you say so, I might as well put my clothes on and go home."

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There was therefore nothing in his answers necessarily amounting to an admission of the girl's statements.

The direction of the learned Commissioner as to the effect of this evidence is as follows:

"One starts with that Maggie Truman comes back from that awful night at 9 o'clock the next morning. Something is seen trying to get over the wall of that field, and Travis runs up and brings her down to her mother. The prisoner is brought into the house, and then there comes the dramatic scene which is so dramatic that one is afraid that it takes away one's power of accurately estimating it, in which the man solemnly swears that he did nothing to the little girl, and the little girl twice or thrice points at him and says, 'Stevie Norton, you did it.' Gentlemen, you must consider that remark carefully. It is for you entirely and anything I say as to fact you are to disregard if it does not agree with your own views. You are the judges of fact, and not I. You must consider this. Do you think first of all that after what she had gone through that night, the little girl was in a condition to accurately remember?

"Gentlemen, at any rate the fact that the little girl did say so renders it necessary to very carefully consider what evidence is tendered on behalf of Stephen Norton."

And later on the learned Commissioner says: "You have then got him telling lies as to where he was, and you will probably think if that is the position that confirms very much what the little girl says, because, if he were the guilty man, he would be very likely to try and explain where he was at a material time by making some statement which must have been untrue, because if he were the guilty man, he was in the wheatfield and not in some other place.

"Gentlemen, you have to consider all these matters, and you have to consider what weight is to be attached to the statement of the little girl."

Objection was taken to this direction on the ground that it directed the jury to take into consideration the girl's statement as evidence of the facts contained in it, and to consider whether, looking at all the circumstances, they accepted it or the prisoner's denial, whereas they ought to have been directed that the statements were not evidence of the facts stated, and that as they were denied by the prisoner, the jury should disregard them.

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We are of opinion that this was a misdirection; indeed, the counsel for the Crown did not contend that it was not, but relied in support of the conviction on the proviso to s. 4 of the Criminal Appeal Act.

We think it well, however, to state the grounds of this admissibility of such statements in evidence, and our reasons for considering the direction erroneous.

As a general rule, statements as to the facts of a case under investigation are not evidence unless made by witnesses in the ordinary way, but to this rule there are exceptions. One is that statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation, or denial, are admissible under certain circumstances.

We think it is not strictly accurate and may be misleading to say that they are admissible in evidence against the prisoner, as such an expression may seem to imply that they are evidence of the facts stated in them, and must be considered upon the footing of other evidence. Such statements are, however, never evidence of the facts stated in them; they are admissible only as introductory to or explanation of the answer given to them by the person in whose presence they are made. Such answer may of course be given either by words or by conduct, *e.g.*, by remaining silent on an occasion which demanded an answer. If the answers given amount to an admission of the statements or some part of them, they or that part become relevant as shewing what facts are admitted; if the answer be not such an admission, the statements are irrelevant to the matter under consideration, and should be disregarded.

This seems to us to be correctly and shortly stated in Taylor on Evidence, s. 814, p. 574 (10th ed.): "The statements only become evidence when by such acceptance he makes them his own statement." No objection was taken in this case to the admission of the statements in evidence, but as the prisoner may be tried again on an indictment on which that question may arise, we think it well to state in what cases such statements can be given in evidence.

We think that the contents of such statements should not be given in evidence unless the judge is satisfied that there is evidence fit to be submitted to the jury that the prisoner by his

answer to them, whether given by word or conduct, acknowledged the truth of the whole or part of them. If there be no such evidence, then the contents of the statements should be excluded; if there be such evidence, then they should be admitted, and the question whether the prisoner's answer by words or conduct did or did not in fact amount to an acknowledgment of them left to the jury.

In trials of prisoners on indictment, in which the most numerous and important of these cases arise, there is as a rule no difficulty in deciding whether there be such evidence or not, as the prisoner's answer appears upon the depositions, and the chance that the evidence with regard to it may be different on the trial is so small that it may be disregarded. When, however, the evidence of the prisoner's answer does not appear, there does not seem to be any practical difficulty in applying the rule above stated. The fact of a statement having been made in the prisoner's presence may be given in evidence, but not the contents, and the question asked what the prisoner said or did on such a statement being made. If his answer, given either by words or conduct, be such as to be evidence from which an acknowledgment may be inferred, then the contents of the statement may be given, and the question of admission or not in fact left to the jury; if it be not evidence from which such an acknowledgment may be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds.

It is, perhaps, too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such manner as to constitute evidence from which an acknowledgment may be inferred, but as above stated, we think they should be rejected unless there is some evidence of an acknowledgment of their truth.

When they are admitted, we think the following is the proper direction to be given to the jury. That if they come to the conclusion that the prisoner had acknowledged the truth of the

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whole or any part of the facts stated, they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement, standing alone, afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but unless they found as a fact that there was such acknowledgment, they ought to disregard the statement altogether.

In this case the direction above set out is not that the jury should disregard the statement, but that they should take into consideration and examine whether it was likely to be accurate, and whether it was confirmed by the other evidence.

For the reasons given above we think this was erroneous, and it was a misdirection upon a point very material to the issue.

It was, however, contended that the conviction might be supported under the proviso to s. 4 of the Criminal Appeal Act, which enables the Court to dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.

We do not think that we can come to this conclusion. The principle on which the Court acts in such cases is laid down in *R.* v. *Stoddart*, *i.e.*, in order to support the conviction we must come to the conclusion that if the jury had obeyed the direction and disregarded the girl's statement, they would—not might—have come to the same conclusion. As we have pointed out, the evidence without the girl's statement was entirely circumstantial, and there were considerations in favour of both a conviction and an acquittal, and we do not think we can say that the jury would necessarily have come to the same conclusion.

We cannot either altogether put out of sight the fact that the prisoner had previously been tried on this indictment and the jury had disagreed, shewing that to some minds, at any rate, there seemed to be doubts in the case

Conviction quashed.

RICHARD SMITH.

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Richard Smith.

Whether a person found in possession of stolen goods gives a reasonable explanation of his possession and whether the possession is recent are questions for the jury.

This was an appeal against conviction on leave granted by full Court. Appellant was convicted on 12th April, 1910, at the Bradford City Quarter Sessions of larceny and receiving stolen goods, and sentenced to three years penal servitude. On 8th May, 1910, the application for leave to call two further witnesses was allowed, together with leave to appeal against conviction.

J. Willoughby Jardine for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment was for stealing and receiving 4 cwt. of old iron. Most of the facts are not in dispute. The iron was stolen between 7 p.m. on the Friday and 7 a.m. of Saturday, April 2nd. There was no direct evidence against appellant of stealing the iron. Between 7 and 8 a.m. on Saturday morning the 2nd April it was taken to Barron's yard and sold at a fair price to Barron by the appellant, who wrote his own name in the book. Appellant gave evidence to the effect that he had bought the iron for 4*s.* 6*d.* the previous day, but did not know the name of the man from whom he bought. The prosecution called a witness named Dracup, who substantially corroborated the appellant's story. It was on the night of the 1st April that the iron was stolen; on Thursday, appellant and Dracup were out hawking; they arranged to meet a man the following evening; they were together all Friday till 9.30. Dracup then went home, and on parting, the prisoner said, "I am going to meet that man we met yesterday and buy iron." That this man existed is beyond doubt. Appellant is in possession of iron recently stolen. The question is whether he gave a reasonable account of how he came by it.

Dracup, in cross-examination by the appellant, confirmed the appellant's story that on Thursday they were out hawking together, and bought some old iron off a man with a hand-cart, and that this man promised to meet them on the Friday night.

My submission is that recent possession is always a question

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of shifting onus. This is not an ordinary case of recent possession. The learned Recorder put the case as if it were. A case of ordinary recent possession is where a prisoner is found in possession about two hours afterwards, and there is no account of how he came by the goods except his own. Here, there is the evidence of Dracup to support the story of the appellant.

Gorham, for the Crown, was not called upon.

The Lord Chief Justice: It was proved to the satisfaction of the jury that the iron had been stolen from the prosecutor's yard by a man unknown on the evening of Friday. It is said that a short time afterwards (about 9 o'clock) the prisoner purchased the iron for 4*s.* 6*d.*, and he said in his statement to the detective that the name of Leadbeater was on the hand-cart of the man from whom he had purchased. Leadbeater is merely the name of a man who lets these carts. On the Saturday morning he sells to a dealer named Barron, and gave his own name. But that fact does not of necessity shew he had rightful possession. He says he bought it from a man in the street whom he went to see by appointment. Who this man was we do not know. Then he applies here to call two further witnesses as to this sale. Their proofs having been taken, Mr. Jardine does not think fit to call them. Dracup says there had been a purchase of iron, and that he knew appellant was going to see this man. It is contended that therefore the jury ought to have been satisfied that it was an honest transaction. The jury were not satisfied with the appellant's explanation, and there is really no ground for this appeal.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND LORD COLERIDGE J.

WILLIAM FLICKER.

JOSEPH CHUTER.

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William Flicker.
Joseph Chuter.

Preventive detention cannot be inflicted unless defendant has been formally found a habitual criminal by the jury.

Flicker's appeal was against sentence, on leave granted by Grantham J. Appellant was convicted on 9th May, 1910, at the Middlesex Quarter Sessions, of larceny in a dwelling-house, and sentenced to six years' penal servitude.

I. A. Symmons for the appellant Flicker (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with stealing and receiving; he was also charged on a further count with having been convicted of felony at the North London Sessions on June 30th, 1908. A detective inspector was called to prove three previous convictions, namely, in March, 1898, for warehouse-breaking; November, 1899, for stealing boots; July, 1908, for stealing jewellery, and for which he was sentenced to twelve, three, and twenty-one months' imprisonment with hard labour respectively. There were other charges against appellant, and he was asked whether he wished those cases to be taken into consideration by the learned Chairman in awarding the sentence, so that they might be disposed of once and for all. Prisoner agreed that that was what he did desire. But this was not according to the formalities prescribed in the Prevention of Crime Act, 1908. Appellant was not charged with being a habitual criminal. The learned Chairman erroneously supposed he could exercise power under s. 12 of the Prevention of Crime Act, 1908. This section merely gives power

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to the Secretary of State where a person has been sentenced to penal servitude for five years or more, and appears to the Secretary of State to have been a habitual criminal within the meaning of the Act, to commute the whole or any part of the residue of the sentence, after the expiry of three years of the term, to a sentence of preventive detention. In passing sentence, the learned Chairman said to prisoner: "I think learned counsel did mention that you were a fitting case to be charged with being a habitual criminal, and I do not know why you have not been so charged; but that has nothing to do with the Court. What we will do is this—we shall take advantage of s. 12 of the Prevention of Crime Act, and we shall recommend the Home Secretary to treat the latter part of your sentence as one of preventive detention."

Further, the sentence of six years was excessive. It is true prisoner had had five previous convictions. But the first two were when he was ten and thirteen years old respectively, and he was merely bound over. Nothing happened then for six years, and then he was sentenced to twelve months' hard labour when nineteen years of age. The other offences were stealing boots in November, 1900, for which he was sentenced to three months' hard labour, and larceny of jewellery in July, 1908. In short, the sentence was excessive, and, moreover, was not given on the merits, inasmuch as s. 12 cannot be construed in the way the learned Chairman construed it.

I. A. Symmons for the appellant Chuter (under s. 10 of the Criminal Appeal Act), who was not present. He was convicted at Middlesex Quarter Sessions of larceny on May 10th, 1910, and sentenced by the Chairman to six years' penal servitude. The Lord Chief Justice gave him leave to appeal against sentence. Practically the same point is raised here as in *Flicker's* case. In addition, however, appellant desires to appeal from the order of the Lord Chief Justice refusing leave to appeal against conviction. Appellant was liberated on 7th September, 1909, after serving a term of imprisonment for burglary. He was out of work until about the middle of November, and then obtained employment on the London & Brighton Railway until 18th December. Then he was out of work till January; he had three weeks' plastering in January,

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and since then he has been casually employed as a coal-trolley man, earning about 15*s* a week. Appellant was not represented at the trial.

Shewell Cooper, for the Crown. There are two reported cases that have a bearing on these appeals. *Kirkpatrick*, 1 Cr. App. R. 170; 73 J. P. 29; 25 T. L. R. 66 (1908); *Raybould*, 2 Cr. App. R. 184; 25 T. L. R. 581; 73 J. P. 334 (1909). The judgment of Channell J. in *Kirkpatrick's* case shews that it is the duty of the judge to take into consideration the treatment which the prisoner is to receive during his detention. In *Raybould's* case, the Chairman would have been entitled to pass the sentence he did, had it not been that on the evidence before the Court, all the elements constituting the accused in that case a habitual criminal were not present. At all events, it seems to have been assumed, although only *obiter*, that the Chairman could act under s. 12 of the Prevention of Crime Act, 1908.

The Lord Chief Justice: We are of the opinion that these sentences cannot stand. We entirely sympathise with the motives which prompted the learned Chairman to give the prisoners the benefit of the Act. It seems to us that this section merely indicates something to be done by the Home Secretary. There is nothing in the words of s 12 which enables the judge to do anything but award a term of penal servitude. The learned Chairman thought he could take advantage of the section and treat the latter part of the sentence as preventive detention. But apart from the construction of the section, there was no finding that appellants were habitual criminals, so that on this ground alone the sentence cannot be properly given. Having regard to Flicker's three previous convictions, it is by no means clear that the jury would not have found him a habitual criminal; at all events, he was not so tried.

The sentences will be reduced to eighteen months' imprisonment with hard labour, to date from conviction. Leave to appeal against conviction in Chuter's case is refused.

Convictions as habitual criminals quashed and sentences reduced.

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HERBERT READE.

It is not a misdirection if the judge points out that the defence makes no suggestion that some other person than the defendant is guilty.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal against conviction, on grounds involving questions of fact, referred by Grantham J.

Appellant was convicted on 13th May, 1910, before Ridley J. at the Leeds Assizes, of carnally knowing a girl between thirteen and sixteen years of age, and sentenced to fifteen months' imprisonment with hard labour.

S. Rowan-Hamilton for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The case is a curious one. Appellant was engaged to be married to Susan Barrick. Susan Barrick has a daughter, Elsie, and appellant is charged with having had unlawful carnal knowledge of this girl while sleeping in the same bed as Susan Barrick and her daughter. The woman, Susan Barrick, is charged with encouraging the offence, under the Children Act, 1908, and her trial has been postponed in order that this question may be determined. My submission is that it was a misdirection for the learned judge to suggest that the burden was on the defence to shew that some one else than prisoner had had connexion with the girl. The learned judge said: "Now who was it did this? Somebody has had connexion with the girl, not immediately before she was seen by the doctor, but earlier, because there was no evidence of recent connexion. Johnson, you know, has not got anything to do with this. The charge against him was that he put his hand up her clothes, and there was an end of that. There is no evidence at all about Pyrah, because she denied that any charge had been made against him at all. The mother has been in the witness box, and she has not suggested any human being ever having had to do with this girl. If there had been anyone who did this, do you not think the mother would have found it out? Would it not have been with her knowledge that during these months when they were living together some person

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had been tampering with the girl? It would be an extraordinary thing if it were not so. Yet, without a question being put to her [Elsie] she leaves the box. There is not a suggestion as to who it could have been except the prisoner. Now I think that is a strong point in this case." My submission is that this passage from the summing up says in effect that the defence does not suggest anyone else had had connexion with the girl; and therefore the jury could not but find that it was the appellant. We could not have called either Pyrah or Johnson, as we were concluded by the girl's answers.

As to the first alleged connexion, viz., in Alexandra Street, Hull, where the girl alleges that she, her mother and appellant were sleeping in one bed, both Mrs. Barrick and appellant say that there was another child, Ada Marshall (illegitimate daughter of appellant), who was on the day in question living with them, and that prosecutrix, Ada Marshall, and another child were sleeping in one bed, and Mrs. Barrick and appellant on a couch in the living room downstairs. The prosecutrix owns that this other girl was in the house, but does not know the date. Ada Marshall came to stay for Christmas, and for two days only. Before the magistrates the prosecutrix said the act took place about two days before Christmas. At the trial she did not deny that it might have been after Christmas, when Ada Marshall had left. Prosecutrix, in cross-examination, denied that Ada Marshall was in the house on the occasion of the first act. Again, she could not remember within four or five weeks the date of the second act of connexion, which took place when they were living in Lake Street.

Then there was the word of Mrs. Worth (who could not be called), an aunt of the prosecutrix, that the girl Elsie admitted she had made previous accusations against Johnson and Pyrah, and that when Mrs. Worth took her round and confronted her with Johnson, she burst into tears, and said she had only made the allegation in fun. It was my intention to call Mrs. Worth and ask her about the girl's credibility. But the learned judge said: "You must take this witness's answers about this. You cannot call Mrs. Worth for any of these points at all; it is not evidence in the case at all." It was entirely my fault that Mrs. Worth was not called. I thought the learned judge was refusing to allow me to test the girl's veracity. It was my mistake, for

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the learned judge was not refusing to allow Mrs. Worth to be called; and her evidence might have had an effect. The conviction was against the weight of evidence.

[The Lord Chief Justice: That is hardly a question for us unless you suggest the evidence is so weak that the verdict cannot stand.]

If Mrs. Brunton's story is believed, there is of course corroboration. Mrs. Brunton said that appellant came into her shop, and that she suggested a "very funny going-on at your house," and that appellant then answered: "The girl Elsie is all the trouble. She can give me away if she likes and lose me my pension."

[The Lord Chief Justice: No statutory corroboration is required, merely because she is or may be an immoral girl.]

W. H. Owen, for the Crown. There is no truth in the suggestion that the girl had had something or other to do with one of these men, Pyrah or Johnson. The learned judge did not mean to suggest nor could the jury have understood him to mean that there is any general duty on a defendant to shew who committed the offence. The judge was simply commenting on the nature of the defence, which had dragged in the names of two other men. He was pointing out that there was no substantial ground against either of these two men, and that if the defence were a true one, surely the mother would have come forward and would have known something about it.

Appellant said that Mrs. Barrick and he were not cohabiting till just before Christmas, but the evidence of the constable Hardwick was that appellant had alleged cohabitation for twelve months previously.

The Lord Chief Justice: There seems to be no misdirection in this case. The appellant, here, was about to marry the woman, Susan Barrick. He had given notice to that effect. He was said to have slept in the same bed for some weeks with both the girl and the woman. There was medical evidence that some one had had connexion with the girl, and there was the

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corroborative evidence of Mrs. Brunton as to the prisoner's guilt. The weight of the evidence is for the jury, but where you have ground for it, you would caution the jury. We can hardly construe the effect of appellant's words to Mrs. Brunton except to say that he meant that this girl had got him in her hand if she chose to make a statement. It does not seem that there is anything in the summing up about Mrs. Brunton's statement about "giving the man away if she liked."

As to Johnson, it is not suggested he had gone beyond an indecent act.

As to the summing up, and on that part of it where Johnson or some other man is mentioned as being concerned with the girl, the best construction is, as Mr. Owen puts it, that the learned judge thought if this suspicious circumstance were well founded, the mother must have known something about it No doubt the jury would have looked with disfavour on her evidence.

The sentence is to run from the date of conviction.

Appeal dismissed.

ROBERT HENRY RODDA.

Robert Henry Rodda.

If on a trial, where consent is a defence, the learned judge directs the jury that that defence was an afterthought, when in fact it was set up at the preliminary hearing (though only in cross-examination), the Court will quash a conviction.

This was an appeal against conviction and sentence referred by the Home Secretary under s. 19 of the Criminal Appeal Act, and an application for leave to call further evidence.

R. B. Murphy for the appellant, who was not present. Appellant was tried on June 17th, 1908, at the Midsummer Bodmin Assizes before Lawrance J. on a charge of rape. I defended appellant; the defence was that the prosecutrix had consented. He was convicted and sentenced to five years' penal servitude, and no appeal was made to this Court. The offence was committed on Thursday, January 23rd, 1908. On 14th December, 1908, appellant wrote a letter to the Home Secretary, raising the

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point unsuccessfully raised by me at the trial. Nothing was done on that particular letter. But, later, a petition was presented to the Home Secretary, asking him to exercise his clemency. The Home Secretary referred it to this Court under s. 19 of the Criminal Appeal Act. The girl was employed at a farm of a Mr. and Mrs. Kelynack, situate about a mile from her own home. Appellant was a labourer on the farm. It was said by the prosecution that on the Tuesday preceding the Thursday on which the act was committed, appellant had been indecently familiar with the girl, and that he then promised if she would say nothing about it he would do nothing more. The case for the prosecution was that appellant came to her on the Thursday while milking in the cow house, took her off the milking stool, and pushed her up against a cornbin, and that she then lost consciousness, and the prisoner effected his object. It was admitted that after the act had been committed she finished her milking, and then went into the house where Mrs. Kelynack was, did some ironing, and then had her tea. She said when she came into Mrs. Kelynack's house she had been crying. Mrs. Kelynack said she noticed nothing of the kind. The girl said that Mrs. Kelynack, being an aunt of the prisoner, would have desired to hush the matter up. But though Mrs. Kelynack was a relative of the appellant, there were two other women present at the time who were not his relatives in any way, and to whom she made no complaint. There were no injuries on the prisoner. There was no medical evidence of violence upon the girl except penetration. When she got back to her mother's house, she was, according to the evidence of her parents, in a distressed condition. They asked her questions, and she then complained to her mother, and said prisoner had insulted her. She was not late home; there was no fixed time for her return home. The appellant admitted that he had had connexion with the girl on the date alleged, but said he had done so with her consent, and that this was the third occasion when this had occurred, the previous occasions having been on the preceding Sunday and Tuesday.

There is very little corroboration of the girl's story except that she went back to her mother and complained. There were two statements made by the appellant, one to the girl's father, and the other to the girl's brother. In the former the prisoner

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admitted that he had done wrong; but if the two statements are read it will be seen that there is nothing to shew any admission that he had had to do with the girl against her will.

The depositions were incomplete, and contained but little to shew that the girl had been cross-examined when before the magistrates to shew consent, or had been asked any questions as to these previous occasions. In fact, such questions had been asked by the solicitor appearing for the appellant when before the magistrates, but they were not fully reported in the depositions. When before the magistrates, the appellant, on the advice of his solicitor, did not himself give evidence, but said he reserved his defence. It was said by the prosecution that the defence of consent was put forward for the first time at the trial.

And the judge, when summing up, told the jury that no one could have known what the defence was going to be at the assizes. I submit that constitutes a substantial misdirection, as anyone present at the magistrates' court must have known the defence was consent.

[The Lord Chief Justice: The learned judge did not refer to the defence; appellant said he reserved his defence, and the learned judge said: "It is no doubt very clever to reserve your defence, for then no one knows what it is going to be."]

From beginning to end there is nothing in the summing up except this point about late defence. No appeal was brought at the time; but rule 48, Criminal Appeal Rules, and s. 19 (*a*) of the Act cures this. It is true the main point I am now making, namely, misdirection, is only incidentally referred to in the petition, but a petition is not a pleading, and my submission is that on a referred case this Court can take into consideration any grounds of appeal.

Since the trial, the girl has apparently gone wrong with some other man. I submit this is ground for taking into consideration whether or no there has been a substantial miscarriage of justice. In January, 1910, she was delivered of a child.

[The Lord Chief Justice: This Court has nothing to do with

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her subsequent conduct, unless you suggest she cannot be believed on oath because of her generally bad character.

PICKFORD J.: This is a referred case, and we are to hear it as a Court of Appeal. If, then, you have any matters suggestive of a generally bad character, they must be such as would have been admissible on trial.]

I admit that, but such evidence is now available; had a witness Johns been called he would have said she was of notoriously bad character; he does in fact in his affidavit say she was "a very fast character." Again, Stapleton, according to the police, is the father of her child, and this man in his affidavit says that he learned from the girl herself that she had had connexion with both the brothers Johns.

[LORD COLERIDGE J.: Suppose this appeal had been lodged in time, and suppose it were clear that the learned judge did dwell mainly on the conduct of the appellant before the magistrates, would that be strong enough for your case now? If not, then all you are saying now as to her conduct is immaterial.]

It has a practical effect on the human mind. *Riley,* 18 Q. B. D. 481; 56 L. J. M. C. 52; 56 L. T. 371; 16 Cox C. C. 191; (1887): C. C. R., shews that the defendant may give general evidence of the woman's character for want of chastity. Moreover, if this is a case of some doubt, the witnesses Stapleton and Johns can be called, and this Court can then reduce the sentence. It is submitted that that course is not inconsistent with s. 19 of the Criminal Appeal Act.

Lawrie for the Crown. The evidence cannot be given. *Clarke,* 2 Starkie, 241 (1817); *Holmes,* L. R. 1 C. C. R. 334; 41 L. J. M. C. 12; 25 L. T. 669; 12 Cox C. C. 137 (1871).

As to *Riley,* there is nothing in the report to bear out the distinction made in *Archbold,* p. 910 (23rd ed.).

No doubt the statement in the summing up as to the manner in which the appellant had brought forward his defence was inaccurate; but it was not so inaccurate as to make any difference to the minds of the jury. It is a statement, moreover, that has to

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do with appellant's conduct throughout the whole course of the case, and has not to do merely with what took place before the magistrate. Again, if the defence were not in reality an afterthought, why did not appellant suggest consent to the brother and father of the girl? Only one question was put before the magistrate. The mistake of the learned judge is therefore a very small one. Appellant's statements are of course admittedly consistent with guilt or innocence. But apart from all this, the point now taken viz., misdirection, was not taken in the petition.

The Lord Chief Justice: Upon the points made as to calling further evidence, we give no opinion. We should, however, hesitate a long time before we said subsequent conduct was a ground for conviction, unless it had a clear connection with the case.

With regard to the application to prove what is merely a separate act of connexion, the evidence is clearly inadmissible. It is true something is said as to a suggestion of generally loose habits; but there is no such suggestion at the trial, and therefore we give no opinion as to whether we should allow such evidence to be admitted.

The real difficulty is as to consent not being set up before the magistrates as the defence. I have not the slightest doubt that if appellant had not reserved his defence, the mistake would never have occurred. If the learned judge had confined his criticism to the fact that the man did not give evidence, no exception could be taken; but it seems to us he went further; he did tell the jury more than once that the defence was a complete afterthought; but there was very little on the depositions to call attention to the defence of consent. In order to do justice in this case we must read the whole of the summing up. Reading the summing up, it is clear that what caused the learned judge to make the mistake was that appellant did not himself put forward the defence. It comes from the bad practice of advising defendants to reserve their defence. He expressly says: "I cannot understand the solicitor not cross-examining the girl herself, &c." This matter constitutes a very large portion of the summing up, and it does raise an important consideration for the jury, whether this defence was not a complete afterthought, which the prosecution were unable to foresee.

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It is only fair to the appellant to say, looking at his letter to the Home Secretary, that he did not wish to attack the character of the girl. Other people have put that into his head. The summing up was not fair to the prisoner, and I think, therefore, that this appeal must be allowed.

Conviction quashed.

Solicitor for Appellant—*A. Walters*, Camborne.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE BRAY.

FRANK FAWCETT(*a*).

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Frank Fawcett.

Leave to appeal will be granted to a habitual criminal if the prosecution gives evidence of "other grounds" than the three statutory convictions, but does not include them in the statutory notice to him.

This was an application to be present, an appeal from the order of Grantham J. refusing leave to appeal against conviction as a habitual criminal, and an application for leave to call further evidence.

Appellant was convicted on 4th June at the Middlesex Sessions of housebreaking and as a habitual criminal, and sentenced by the Chairman to three years' penal servitude and five years' preventive detention.

Roland Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Evidence was admitted against appellant which, in view of the notice served on him under s. 10 of the Prevention of Crime Act, was inadmissible. The evidence in question was that of Detective Inspector William Eustace, who was not concerned in the case in any way, but who happened to be present in Court, recognised the prisoner, and then gave evidence to the effect that he quite well knew the prisoner and had seen him on some thirty or forty occasions associating with several dangerous criminals, and acting in concert with them. On December 14th, 1909, appellant was bound over; on May 20th, 1910, this charge was preferred, so that there was an intervening period of about five months. The notice under the Act contained as a "ground" a statement that though during the period in which he was at

(*a*) See p. 115, below.

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liberty appellant had been given opportunities of working, he had nevertheless returned to his dishonest and criminal life. In *Turner*, 3 Cr. App. R. 103; 74 J. P. 81; 26 T. L. R. 112 (1909), and *Waller*, 3 Cr. App. R. 213; 74 J. P 87; 26 T. L. R. 142 (1909), it is clear that where the prosecution intend to rely on any ground beyond the three convictions, such ground must be stated in the notice.

CHANNELL J.: In this case certain evidence was given by a police officer who happened to be in the Court at the time; and he happened to know the prisoner, and said he was an associate of thieves. This evidence having been given, it was properly put to the jury that notwithstanding the prisoner's evidence that he was "continuously working," he was leading a double life, and the jury so found.

It is suggested that we should allow him to call witnesses to disprove this statement of the police officer.

But there is a further point. The special provisions for the protection of habitual criminals provide that they should have a notice specifying certain things, amongst others, the grounds on which it is proposed to ask the jury to find that a man is a habitual criminal. In *Turner's* case the Court said: "What has to be stated is the ground upon which it is intended to found the charge; and the Court is of opinion that that must be given in a real and substantial form; that he must be told the grounds, and that it is not sufficient to say, in the words of the statute, 'We propose to prove that you have been persistently leading a dishonest life, or that you have been persistently leading a criminal life.'" (3 Cr. App. R. 159.)

That case came before the Court in *Waller's* case, and the judgment was varied on one point, but not on that particular point. In the present case the notice states that the prisoner is going to be charged as a habitual criminal on the grounds—

"(1) That since attaining the age of sixteen years you have at least three times previously to your conviction of the crime charged in the said Bill or Bills of Indictment been convicted of a crime within the meaning of the said Act.

"(2) That between the 14th day of December, 1909, and the 20th day of May, 1910 (with the exception of a period from the 17th day of January to the 17th day of February, 1910),

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you were given various opportunities of earning an honest living; nevertheless, you returned to your dishonest and criminal life."

Now does the evidence that was given by Inspector Eustace constitute a ground that fairly comes within the notice? It is desirable the matter should be considered. Prisoners are entitled to know what evidence is to be given, in order that they may have an opportunity of putting in an answer. It is doubtful whether appellant has had that opportunity.

Leave to appeal granted.

Charles Henry Watkins, Henry Smallwood and Albert Edward Jones.

CHARLES HENRY WATKINS, HENRY SMALLWOOD AND ALBERT EDWARD JONES.

The report or representations made to the Court of trial by the Prison Commissioners as to the suitability of a convicted prisoner for treatment in a Borstal institution, under sect. 1 (1) *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act*, 1908, *are not binding on the judge.*

This was an appeal against sentence. Appellants were convicted on 25th May at the Shrewsbury Borough Sessions of housebreaking and burglary; Watkins was sentenced to two years', Smallwood and Jones to twenty-one months' imprisonment with hard labour.

S. R. C. Bosanquet for the appellants, who were not present. The three lads, whose ages ranged between sixteen and nineteen, all pleaded guilty to the charges, two of which were for housebreaking and one for burglary. Some little difficulty may be felt by this Court, as the shorthand writer took no notes. The Court has, however, a police report, which tallies with the instructions received.

No one of these appellants has ever been previously convicted, although there was a suggestion of previous dishonesty against Smallwood and Watkins. But as regards the appellant Jones, the facts are even more in his favour; he was in his situation for two years, and there never was a suggestion of dishonesty. His firm, having been communicated with, replied that they would be willing to take him back into their employ. The sen-

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tence passed on Watkins was enhanced because he pointed a pistol at a man (whose house appellants were rifling), with the intention of terrifying him. But the pistol was not loaded, and was merely a spring pistol. It seems the lads had been reading pirate stories. It is submitted that two years' hard labour is a very heavy sentence; indeed, it is rarely passed at all.

No doubt the Borstal system would have been admirably suitable to such prisoners; but that system applies only to youths who have been previously convicted. It is true there is no statutory authority for the proposition, but the Home Office Regulations contain the limitation.

[DARLING J.: We agree with the learned Recorder, where he said he thought it was a case for Borstal treatment.

CHANNELL J.: The difficulty is, what will the Home Office do with them?]

That was the difficulty felt by the learned Recorder. He might have sentenced the prisoner to be confined in a Borstal institution, but the Home Office could have refused to carry out that part of the sentence.

There is one other point in favour of the prisoners. They made a complete breast of the matter and assisted the police to get the things back.

Alexander Graham, for the Crown. The learned Recorder was exceedingly regretful he could not sentence on the Borstal system. He wanted to get the governor of the prison at Shrewsbury to modify his view; the governor said it was not a case for Borstal treatment, and so the learned Recorder had no option.

[CHANNELL J.: The governor seems to have gone beyond that and recommended what should be done.]

DARLING J.: In this case three young persons were convicted of burglary and housebreaking, and of stealing considerable sums of money. We think it important to notice that they had committed three of these burglaries. Besides that, they were furnished with a cold chisel, and entered, generally, on a course

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of crimes of this nature. It is said they were led into this by a study of literature of an inflammatory kind. They took to burglary as the next best thing to piracy. The learned Recorder said, "Here are you three—I won't call you boys, because you are all over sixteen, and one is nearly nineteen—here you have committed three burglaries in successive weeks, and secured in two of these deals large sums of money. The worst feature, of course, in the case is what happened on the last occasion, when you, Watkins, used a pistol, and levelled it at the head of the unhappy Mr. George, whose house you were rifling. That is a most serious thing. I have had serious thoughts, and at one time it was my intention to send you to penal servitude. I am not going to do that. The Court has been adjourned to enable me to communicate with the governor of Shrewsbury Gaol. I have now at last been able to speak with him, and the reason why I wished to communicate with him was this: He, under the recent Act of Parliament for the Prevention of Crime, has made certain recommendations in regard to you three prisoners, you being all under twenty-one and over sixteen, in which he says you are not proper subjects to be sent to the Borstal. In my humble judgment that is exactly the place where you ought to go. That is the opinion held by all judges and magistrates up to the passing of this recent Act of Parliament, that Borstal was intended for boys who had a clean record up to the present time and have fallen into criminal habits, and who, if not assisted, will certainly become confirmed and desperate criminals. They are taught a trade; they are allowed various privileges which ordinary prisoners do not have. They are allowed the use of books, their food is better, and they have more relaxation. The chief point is that they are taught a trade, and have some chance of becoming better citizens in the future. However, the governor thinks you are not proper subjects for the Borstal system, and although I hold a different opinion, I think that is more within his province than mine. The result is that you will all three go for long terms of imprisonment where you will not have the benefit of the Borstal system, except so far as the prison authorities may find it in their power to do it." Upon which he passed sentences with which we cannot agree. They are very severe, and not frequently given, and therefore it is necessary to quash those sentences, and under our

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powers to substitute something else. In our judgment it is a case proper for the Borstal system. The Prevention of Crime Act, 1908, 8 Edw. 7, c. 59, s. 1 (1) enacts: "Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court—

"(a) That the person is not less than sixteen nor more than twenty-one years of age; and

"(b) That, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime;

"it shall be lawful for the Court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution for a term of not less than one year nor more than three years."

We are told, therefore, that this may be done "where by reason of his criminal habits or tendencies or associates it is expedient." Now these prisoners had committed three separate burglaries; it is useless to say they are not of criminal habits. These are the very class of person intended by the statute to be treated under penal discipline. The statute goes on to provide that, "before passing such a sentence, the Court shall consider any report or representations which may be made to it by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal institution, and shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid." This report, it is provided, is to be made by the Prison Commissioners. But by a Home Office circular of last year, entitled, "Reformation of Young Offenders," the representation of the Prison Commissioners was directed to be made in the form of a statement attached to the list of prisoners for trial, and in this case the governor had attached to the names of the appellants a statement that they were not suited to the Borstal system, upon the grounds that they were not of criminal habits or tendencies. He stated also that two of the appellants had

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good homes, and that in regard to Smallwood, he had defective eyesight.

Here the police gave evidence as to the character of each of these boys. They are all said to be associating with bad characters; and we know money was obtained by the commission of these burglaries. The only thing to be said against our opinion is the fact that acting on the memorandum of the 1st September, 1909, the governor had made a note on the Calendar with regard to each of these prisoners. We differ from the governor of the gaol in his opinion that they are not of criminal habits.

As to Smallwood, we will substitute a sentence of four months' imprisonment with hard labour, as his eyesight is bad, and he is, therefore, not a fit subject for Borstal treatment.

As to Watkins and Jones, we think the judge is not bound by a mere statement in the Calendar. The statute says he is to "consider any report"; but he is not bound to come to the same conclusion; he should give his own consideration to it. The facts distinctly disprove that they are not of criminal habits and tendencies. Watkins will therefore have eighteen months' imprisonment under the Borstal system—it was he who had the pistol—and Jones fifteen months' imprisonment under that system.

Sentences varied and reduced.

Solicitors for Appellants—*Woodcock, Ryland and Parker,* for *G. M. G. Mitchell,* of Shrewsbury.

David Henderson.

DAVID HENDERSON.

Severity of sentence.

This was an appeal against sentence on leave granted by Grantham J., and from an order of Grantham J. refusing leave to appeal against conviction and legal aid; there was also an application for leave to call further evidence.

Appellant was convicted on June 8th, 1910, at the Central Criminal Court, before Mr. Commissioner Rentoul, of robbery

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with violence, and sentenced to eighteen months' imprisonment with hard labour.

Appellant set up an *alibi*, and submitted that the prosecutor had not been able to identify him as the man who went through his pockets while another man assaulted him from behind.

Tully-Christie for the Crown. The prosecutor has absolutely no doubt that is the man who robbed him while the other man held him at the back. There was no likelihood of his being mistaken, as the urinal, where the assault took place, was well lighted. The police description was not put in evidence because it was objected to at the trial on the ground of lapse of time.

DARLING J.: This trial underwent several vicissitudes before being concluded. Why the learned Commissioner suddenly took a different view from that which he had expressed earlier in the case, and passed so severe a sentence, does not appear.

The two heads of this appeal are against conviction and sentence One question is whether the prosecutor picked the right man out at the police station; having regard to a part of the evidence it rather looks as if he identified someone he had not seen. But we are satisfied that he did mean to say he saw the two men at the time of the robbery, and he gave a description of them. Moreover, this man was seen by a police constable near the spot somewhere about the time the robbery took place. He was taken into custody, and then gave the police constable to understand that he was at a sailors' home at a quarter to one; the solicitors and counsel for the prisoner came to know this was untrue. The mere fact that he went there later was not important, for he was bound to go somewhere. His statement with regard to place became immaterial as that with regard to time was proved to be false. He did not go into the witness box; if ever there was a case where prisoner ought to have gone into the box this was it; for only one man could have identified him, namely, the prosecutor, who was a Dutchman scarcely able to make himself understood. But appellant's advisers would not allow him to do so, and he did not insist on giving evidence, although he is an intelligent man.

We cannot say the verdict was wrong, although the jury might well be dissatisfied with the evidence. Therefore we cannot,

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having regard to the rules of this Court, interfere with the conviction. As to sentence, the learned Commissioner seemed inclined to treat the prisoner very leniently. Then he altered his mind, and sentenced him to eighteen months' imprisonment with hard labour. The man has never been convicted before, and it appears, having regard to all the facts of the case, an extremely severe sentence.

He did not use violence; the man who was more responsible is either dead or dying, and in the circumstances the justice of the case is met if the sentence is reduced to twelve months' imprisonment with hard labour.

Sentence reduced.

SARAH LYONS.

Sarah Lyons.

On the trial of an indictment for murder, the judge is not bound to suggest to the jury that they can find a verdict of "Not Guilty," unless the facts require it.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal against conviction on grounds involving questions of fact. Appellant was convicted on June 3rd, 1910, at Wells Assizes before Mr. Justice Ridley, of manslaughter, and sentenced to five years' penal servitude.

Croom-Johnson for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Appellant was indicted for the murder of her newly-born illegitimate child. The facts shewed that she was in the infirmary ward in bed two days after the birth of the child, which took place on the road a quarter of a mile from the Union, and the child was with her. The case for the prosecution was that during this time she crushed the parietal bones of the child's head, and so caused its death. In summing up, the learned judge said: "Of course, this is a case of a very painful nature, a case in which this woman is put before you charged with the murder of her infant child. If she intentionally did an act which deprived the

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child of life, she would be guilty of its murder; if a similar act is done, but not upon purpose, by neglect, she would be guilty of manslaughter. If she did not do it at all, she ought to be acquitted Broadly speaking, those are the three lines—if she deliberately, and with intention, squeezed its head between her hands so as to break the bones and produce the fatal injury, an injury which I think she must have known must be fatal, she would be guilty of murder. But if that was done owing to neglect, not of purpose, that is to say, if she had not formed the idea that she would deprive it of life, but that by careless neglect, culpably neglectful treatment of the child, she brought about the same effect, she would be guilty of manslaughter; that is to say by causing its death but not by way of murder. If she did not do it at all, then she would be entitled, of course, to be acquitted."

There is a substantial misdirection here; for there was no evidence at all that she had neglected the child. The case all through was that appellant whilst in bed had taken the child's head between her hands and pressed it so as to cause a fracture. The learned judge directed either murder or manslaughter by neglect; but the case about pressing the head carelessly was never an issue; murder or nothing was the case for the Crown.

The child was born by the wayside, no one was there at the birth; her opportunity was clearly then, and not in the infirmary ward. The case against her rests entirely on the evidence of the doctor.

[DARLING J.: What do you suggest accounts for the condition in which the child's head was found? You do not suggest anyone else did it?]

No, there can be no such suggestion; but overlaying might have caused it, although the doctor said he was not of that opinion. The evidence is that the child was lying upon the mother's right side; prisoner suggested it might have slipped down. My submission is that this was a perfectly innocent explanation, and that the child slipped down between the arm and the side of the mother. The bones were soft, as one would expect in the case of a child then no more than from thirty six to forty hours old, and in consequence the slightest pressure would have caused

severe injuries to the head. I suggest that the after-pains of the mother might have caused her involuntarily to exert sufficient force. I do not think the doctor gave any reason or sufficient reason for refuting the suggestion of overlaying. He did not say the injuries could only be caused by pressure from hard substances on each side.

There was the evidence of Agnes Bullock, who was in the same room at the time, that the child's head was in such a position that she could see the top of it, and that when she went in response to the mother's call, to pick the baby up, she found it neither on the arm nor in the bed, but between the arm and body.

[CHANNELL J.: Even if it is possible that the child slipped down and so got crushed in the way you now suggest, is that not negligence?]

No; it would not be neglect in the sense of exposing it, or otherwise omitting to do something that ought to be done.

[DARLING J.: That may be; but would it not be negligently handling it while in bed?]

The learned judge left murder or manslaughter by neglect. Upon the question of murder the case rested entirely on whether appellant did or did not do something with her hands. The jury negatived that by their verdict.

[DARLING J.: Possibly the jury thought she went very near doing the act on purpose, but did not think fit to imply it in their verdict.]

Agnes Bullock never speaks to any movement by the woman; therefore the hypothesis of negligence must fail. We cannot throw the onus on the woman to prove she is not guilty.

[CHANNELL J.: Did you mention manslaughter?]

No. The jury by their verdict must be taken to have acquitted her of having done any definite injury, and that is why it is

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material to ascertain on what ground she is found guilty of manslaughter.

A. H. S. Howard, for the Crown, was not called upon.

DARLING J.: In this case Sarah Lyons was tried for the murder of her infant child, and the child was killed by her either intentionally or by some gross or culpable neglect not specified. There was evidence that before ever the child was born, she had expressed an intention of doing away with it. She having been left alone with it in the infirmary ward for half an hour, it was found that the bones of the head were squeezed in, and that the child was dead. She did that either with her hands or in some way by culpable neglect. Juries are not invariably logical, especially in cases like this. If they had been as logical as Mr. Johnson requires, they might have well found murder. He says the learned judge did not give them an opportunity of saying "not guilty." But it was almost a concession that he left them to find manslaughter at all in this case. It is suggested that the learned judge did not properly point out how they could arrive at a verdict of manslaughter. But it is very difficult to see how one could do it at all.

That there can be said to have been any miscarriage of justice this Court cannot say. This appeal must, therefore, be dismissed, and we think that the verdict was one that the appellant was fortunate to secure.

Appeal dismissed.

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EDWARD FISHER.

Where a person is induced by fraud to part with the possession of goods or money, the property therein still remaining in him, the defrauder may be indicted for larceny; but where a person parts with the property as well as the possession, even though induced by fraud, the defrauder can only be indicted for obtaining by false pretences, or (in a proper case) conspiracy to defraud.

This was an appeal, by leave of Grantham J., against conviction for larceny. Appellant was convicted on 7th June, 1910,

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before Phillimore J. at the Norfolk Assizes, and sentenced to six months' imprisonment with hard labour.

Gerald Dodson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was charged with having obtained £2 from an auctioneer by a trick. The facts were that Fisher and another man, Sheen (who was tried with him, but who has not appealed), took two bicycles over to Wymondham and put them into an auctioneer's sale. The two men parted company before they arrived at the sale. Appellant went to the auction room and put a reserve of 25*s*. and 18*s*. on the two machines. Sheen then came to the sale, and bid the reserve price for the bicycles. Before Sheen paid the money to the auctioneer, however, appellant went to the auctioneer and, taking advantage of the auctioneer's practice to pay the money before he received it from the person to whom the articles were knocked down, obtained payment of £2, three shillings being retained by the auctioneer as commission. The two men then left the place and met together in a public-house. The bicycles were practically worthless, and it was clear that the whole thing was a preconcerted scheme. Leave was given by Grantham J. on the question whether this was larceny by trick or obtaining by false pretences.

My submission is that this was obtaining money by false pretences or conspiracy to defraud. According to Archbold (23rd ed.), 447, "It is well established that if the owner, of his own free will, part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent were the means by which the delivery of the goods was procured," citing *McGrath*, L. R. 1 C. C. 205; 39 L. J. M. C. 7; 21 L. T. 543; 11 Cox C. C. 347 (1869), and other cases. In all indictments for larceny, there must be the stealing and taking. See Hale, 1 Pleas of the Crown, 165. The form of the indictment is "did steal, take and carry away." My submission is that *Middleton*, L. R. 2 C. C.; 42 L. J. M. C. 73; 28 L. T. 777; 12 Cox C. C. 260, 417 (1873), shews that fraud of this kind only affects the taking and does not really affect the stealing at all unless there is a contract between the parties. The judgment of Bovill C. J. in *Middleton* shews how far fraud would vitiate this transaction.

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[DARLING J.: The correct distinction is, that if the owner part with the possession only, retaining the right of property, the offence is larceny; but if the owner part not only with the possession, but the right of property, it is not larceny. *Davenport* (1826); 2 Russell on Crimes, 1211, 7th ed. Is that not enough?]

See also the judgment of L. Coleridge C. J. in *Buckmaster*, 2 Q. B. D. 182; 57 L. J. M. C. 25; 57 L. T. 720; 52 J. P. 358; 16 Cox C. C. 339 (1887); C. C. R., because it might be suggested that there was no contract between the auctioneer and appellant. I submit there is a contract.

[CHANNELL J.: Is not the case against you, not that there was no contract, but that the purchase by Sheen was not *bonâ fide?*]

Darling J. cited *Russett*, (1892) 2 Q. B. 312; 67 L. T. 124; 56 J. P. 743; 17 Cox C. C. 534; C. C. R. If that case is put against me I should like to rely upon the judgment of Pollock, B. The Court arrived at its judgment by founding on *Buckmaster*, there being in both cases merely a payment on account by the prosecutor. The clerk to the prosecutor in this case had authority from the prosecutor to pay over this £2, and he handed it unconditionally to the appellant.

[CHANNELL J.: Did he not part with the money on the supposition that there had been a *bonâ fide* purchaser of the bicycles?

DARLING J.: Suppose a man owed money to a person he knew by sight, and another man came to him disguised, and the debtor paid the money to this other man. Would that be larceny or false pretences?]

False pretences, on the authority of *Barnard*, 7 C. & P. 784 (1837)

[DARLING J.: Does the prosecutor intend to part with the property? If he does not know the facts or the person, his intention is founded on a supposition of fact which cannot exist.]

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I accept the position. But the curious part of this case was that the clerk handed over the money before the goods had been taken out. There was nothing whatever done to verify the sale.

[CHANNELL J.: But you defended him without raising the point.]

I can explain. I was instructed at the last moment, and I had to rely upon the opening of my friend for the facts. I was forced to take the case on its merits, though when my friend opened, the case of *Middleton* did occur to me. In my submission, the question is whether there was or was not a perfect contract between the auctioneer's clerk and the prisoner. The property passes, even though the bargain may have been induced by fraud. *Clough* v. *L. & N. W. Rail. Co.*, 41 L. J. Ex. 17; L. R. 7 Ex. 26; 25 L. T. 708; (1871) Ex. Ch., cited in *Middleton*, L. R 2 C. C. 44. We have here a contract complete and fulfilled when the clerk hands over the proceeds of the sale. The learned judge got the auctioneer to admit that he took his chance of getting the money from a purchaser. Therefore it is immaterial that there was not a *bonâ fide* purchaser, for there was a name in the ledger.

[BRAY J.: I am not sure that it could be said there was not a purchaser. I rather think Sheen could have been sued as a purchaser.]

Bingley, for the Crown. My submission is that Fisher is in no better position than Sheen. The jury found they were acting in concert, and that Sheen's bid was really Fisher's bid. It is impossible to suggest that if Fisher had disguised himself and then had gone himself to bid, and had afterwards drawn the £2, that would not have been larceny. It is difficult to reconcile the cases, as appears from *Oppenheimer* v. *Fraser and Wyatt*, (1907) 2 K. B. 51; C. A. The judgments of Hawkins and Wills JJ. in *Russett* (above, p.), are in favour of this proposition. I submit Fisher knew well the purchase would not be completed by payment.

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[CHANNELL J.: The real offence here was conspiracy to defraud. Whether it is false pretences or not is difficult to say.]

I have a line of authorities to shew that where defendants are clearly acting in concert with the fraudulent intent *ab initio* to get the prosecutor's money, that is larceny. They never intended to pay for the bicycles; the fraud was meditated from the beginning. *Sharpless and Greatrix*, 1 Leach 92; 2 East P. C. 675 (1772).

[BRAY J.: But the sale was not complete in that case; there was no intention to part with the property there.]

The next case is *Pear*, 1 Leach 212; 3 R. R. 703; 2 East P. C. 685, 697 (1779), where it was held that obtaining a horse under the pretence of hiring it for a day and immediately selling it, is felony, if the jury find the hiring was *animo furandi*. If the deciding line is a false pretence, surely the prisoner in that case obtained the horse on the false pretence of hiring it. I submit that is not really the *ratio decidendi*. The judgment makes that clear.

[BRAY J.: It is clear that was only a hiring, and the property does not pass by a hiring.]

As to *Pear*, it is stated at 2 East's Pleas of the Crown, 686: "Two of the judges thought that as the delivery of the mare was obtained from the owner by means of asserting that which was false; and as the two statutes . . . . had made the offence of obtaining goods by false tokens or false pretences, punishable as a misdemeanour only; and the stat. 33 Hen. 8 had distinguished the case of obtaining goods by false tokens from the case of obtaining by stealth; they were bound by those statutes to say the offence was not felony"; and again, "But ten out of the eleven judges held it to be clear that the offence would have been felony by the Common Law, if the statutes had never existed; and seven of them held that it was not within or at all affected by the statutes of Hen. 8 or Geo. 2"; and again, p. 688, "in all these cases the intention was the thing chiefly regarded, and fraud supplied the place of force"; and see the footnote: "Wherever there is a real and *bonâ fide* contract and a delivery,

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and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bonâ fide* contract, and the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit a felony" (*per* Ashurst J.). *John Patch*, 1 Leach C. C. 238; 2 East P. C. 678 (1782), is also in point.

I submit that if this was a scheme from the beginning to get the prosecutor's money through the hand of Sheen, these cases shew that that is sufficient to maintain this indictment. If the jury find that it was part of the scheme that the money was to be obtained by a false purchase, then no contract is proved, but a fraud whereby a felony was committed. *Slowly and Humphrey*, 12 Cox C. C. 269; 27 L. T. 803 (1873); C. C. R., is in point.

[CHANNELL J.: The prosecutor there never intended to part with the onions unless he also obtained the money.]

I submit the case is on all-fours.

[DARLING J.: If you are right there is no distinction between larceny by trick and false pretences.]

DARLING J.: We feel compelled to decide that this conviction must be quashed. The facts were that Fisher and Sheen (who has not appealed) went to an auction. Appellant took two old bicycles to the auction and had them put up at a reserve price of £2 3*s*. By an arrangement between Sheen and Fisher, Sheen was to bid for them. He did so, and the bicycles were knocked down at the reserve price. Before Sheen paid the money, Fisher went there, and, taking advantage of the auctioneer's practice to pay the money before he received it from the person to whom the articles were knocked down, he got payment of the £2 3*s*. The two men then left the auction room. Sheen never paid the auctioneer, and the whole transaction was clearly a preconcerted scheme. In these circumstances it has been contended on behalf of Fisher that he could not be convicted of larceny by trick, although possibly he might have been convicted of some other offence. The point was not taken at the trial, and therefore it was not dealt with in the summing up. No blame can possibly

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be attached to Mr. Dodson; the point hardly occurred to him. We think that the distinction between larceny and cases of false pretences is very clearly expressed by L. Coleridge C. J. in *R.* v. *Russett* (1892: above, p. 312), where he said: "When the question is approached it will be found that all the cases, with the possible exception of *R.* v. *Harvey*, 1 Leach 467 (1787), as to which there may be some slight doubt, are not only consistent with, but are illustrations of the principle, which is shortly this: if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny. This seems to me not only good law, but good sense, and this principle underlies all the cases. If, however, authority be wanted, it is to be found in two cases which we could not overrule without the very strongest reason for so doing. The first is *McKale*, L. R. 1 C. C. 125 (1868), where Kelly C. B. said: 'The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny.' The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority." It seems to us that, having regard to all the cases, the distinction between the two offences—larceny and false pretences—still was as pointed out in that passage. In *R.* v. *Russett*, Pollock B. said: "My mind has therefore been directed to the facts of the case in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion he certainly did not." Looking at the facts of this case with the same object, we can only come to the conclusion that, although deceived no doubt as to what had really happened as to the sale of the bicycles, the auctioneer, through his clerk, did intend to part, not only with the possession of the £2, but also to part with the property in that money. We cannot hold that this case was taken outside the rule laid down in the passages I have just read from *R.* v. *Russett*. Therefore there is nothing for it but to say that this case does not

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fall within the rule which would make it a case of larceny by trick. The appeal will, therefore, be allowed. At the same time, we desire to add that in our opinion the Legislature might well consider whether it is not time to prevent the occurrence of such a case as this by an enactment analogous to that which provides that where, on the trial of a person indicted for false pretences, the facts established a case of larceny, the prisoner should not be entitled to be acquitted on the ground that the indictment was for false pretences. We think there should be a correlative enactment under which the present appellant might have been found guilty of obtaining by false pretences. It is impossible to do this as the law now stands. We also desire to say that, taking the view we do, the appellant has never been in peril upon the charge of obtaining by false pretences, and that he ought to be indicted with the other man Sheen for conspiracy to defraud, and counsel should consider whether the appellant should not also be indicted for obtaining the money by false pretences.

Conviction quashed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE HAMILTON.

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CLAUDE HAROLD CANHAM.

Severity of sentence.

The sentence on a first offender with a previous good character should not, as a general rule, be so severe as that on a co-prisoner with a bad character.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal against conviction on grounds involving questions of fact and against sentence. Appellant was convicted on June 8th at the Norfolk Assizes, before Phillimore J., of receiving stolen goods, and sentenced to six months' imprisonment with hard labour.

Gerald Dodson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of receiving church plate stolen on a Sunday, and so far as the point of law is concerned, my submission is that the learned judge misdirected the jury in that he omitted to point out in his summing up that the jury must be satisfied that at the time the prisoner received the goods he knew they were stolen. The direction was eventually given, but only at the conclusion of the summing up on the suggestion of counsel for the defence. The plate was stolen on Sunday, the 5th day of June; on the Monday following it was brought by the thief, Mason, to the prisoner's shop, and on the ensuing day the police got to know of it. Appellant gave in exchange the sum of sixpence, together with a packet of Woodbine cigarettes; but this was not intended by appellant to represent the price; the money and packet were given solely to get rid of Mason, who continued to haunt the shop of appellant until he should get something. It might be argued that as one of the pieces contained an inscription on it, appellant must have known it was stolen at the time he received the

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plate, but the evidence shews he gave no thought to the matter at all, and merely cast the stuff in a litter on the floor, and gave no further heed to it that day. On the following day he found the inscription, and then, of course, his suspicions were aroused. The police used to visit his shop as a matter of course, and consequently appellant, realising the significance of the inscription, did not at once apprise them of the fact that he had the plate. Moreover, appellant was in drink at the time. All his subsequent conduct indicates that he did not know the property was stolen. He could easily have concealed the piece with the inscription on it had he chosen, but he voluntarily gave it up to the police on the Thursday. Appellant suffered by juxtaposition with the thief Mason, and Thompson, the man who had tried to melt the plate. They were all put in the dock together. Appellant had carried on business as a respectable tradesman for no less than thirty years, and there never was a charge against him before this of any sort. Moreover, he never traded in metal, and he explains this transaction by the fact that he was ill at Christmas, and then unfortunately took to drink. The police admitted he was in drink at the time he was approached on the subject of receiving.

As to the sentence, it is true appellant received no more than six months' imprisonment with hard labour, but he had never previously been convicted, and, indeed, his conviction caused much feeling in his town, so much so that a petition was prepared on his behalf, but dropped in favour of this appeal. The police themselves were quite ready to come down and give evidence of his excellent character.

North, for the Crown, was not called upon as to the conviction, nor on the length of the term of imprisonment, but as to the commuting the term to imprisonment in the second division.

North: I leave it to your lordships.

Darling J.: There is no doubt this case was left with a proper direction to the jury. Mr. Dodson contended that the attention of the jury was not directed to the question whether the appellant had guilty knowledge at the time he received the goods, but that their attention was directed exclusively to what took

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place on the Tuesday. But it is evident that the learned judge did direct the jury on all points, and that on that direction the jury found appellant had received with guilty knowledge. One of the pieces of plate bore an inscription indicating it to be a "copy of original chalice at Norwich, 1569: given by Mr. Eustace Gurney, 1898." The appellant's own evidence seemed to justify the conclusion that he knew the property was stolen; the jury could hardly have acquitted him unless they thought that he was too much in drink at the time to know what he was doing.

The appellant had, however, borne a good character as a watchmaker and working jeweller. Having regard to his previous good character, we think a distinction ought certainly to have been drawn between him and Thompson, whereas Thompson also received six months' imprisonment with hard labour. Therefore the sentence will be changed to imprisonment for six months as a second-class offender, the sentence to date from conviction.

Sentence reduced.

George Webb.

GEORGE WEBB.

Severity of sentence to detention under the Borstal system.

This was an appeal against sentence. Appellant was convicted on June 4th at the Middlesex Sessions of shopbreaking, and sentenced by the Chairman to three years' detention in a Borstal institution.

Appellant appeared in person.

S. Moses for the Crown. If your lordships should be of the opinion that a smaller sentence should be inflicted, I am instructed not to offer any opposition. The appellant is only seventeen years of age. The Chairman was actuated by the idea of doing that which would be of most benefit to the boy. There was, however, some objection to his reception on the ground of physical defect. It was feared he might take longer than others to learn a trade. An ordinary apprenticeship, however, would have been for seven years.

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CHANNELL J.: In this case the Court quite appreciates the motive of the learned Chairman; we agree that it is a case for the Borstal system, and that it will be for the benefit of this young lad to put him under that treatment. The sentence is somewhat too long; the offence was quite a trivial one; appellant broke into the shop by means of a hole in the wall that was already there, and then stole, among other very trifling articles, some brass knobs from a bedstead. Apart from the fact that his character was such as to make him exactly the person for the discipline of the Borstal system, he would have received quite a small sentence.

The Court do not think fit to alter the decision to put the appellant under the Borstal system instead of a short sentence of imprisonment, and so we merely reduce the punishment to two years in a Borstal institution.

Sentence reduced.

SIDNEY DEBENHAM GREENWOOD.

Sidney Debenham Greenwood.

Under sect. 1 *of* 1 *Edw.* 7, *c.* 10, *the Larceny Act*, 1901, *the intent to convert money, &c. to one's own use may be formed at or before the time of conversion and not necessarily at the moment of receipt.*

This was an appeal against conviction and sentence. Appellant was convicted on 17th June, 1910, before Phillimore J. at the Essex Assizes, of the fraudulent conversion of the sum of £1 3*s*. 2*d*. within the meaning of the Larceny Act, 1901, and sentenced to three months' imprisonment with hard labour.

St. John Morrow for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment charged appellant with having been entrusted by the prosecutor with the sum of £1 3*s*. 2*d*. for the specific purpose of negotiating a settlement of a certain claim by Messrs. Walter Long & Co. against the prosecutor Baker, and to pay the money to Long & Co., and if they refused to accept it, then the appellant was to pay the money into the Clerkenwell County Court: instead of which he fraudulently converted the said money to his own use. Ap-

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pellant was secretary of the Workmen's Legal Aid Society. It is submitted that the learned judge misdirected the jury, in that, with the exception of one short sentence at the beginning of the summing up, he nowhere directs their attention to the question of intent. In order to convict under the Larceny Act, 1901, it was necessary to lay before the jury specifically the question whether or not appellant had intended ultimately to deprive the prosecutor of his money when he received it.

[CHANNELL J.: The Act of 1901 was passed to get rid, amongst other things, of the difficulty created by the distinction between a fraudulent intent at the time of receiving and a fraudulent intent at the time of appropriation.]

It was nevertheless necessary to put the question of intent to the jury. The learned judge should have directed the jury that the appellant intended to repay the money to the prosecutor.

[CHANNELL J.: But he was to have paid the money into Court.]

No doubt that was the arrangement if one looked at the agreement strictly. But conversations that had taken place between the appellant and the prosecutor no doubt varied the agreement. The learned judge should have put it to the jury that the whole case might be merely a question for the County Court.

Grantham, for the Crown, was not called upon.

HAMILTON J.: This is a case of fraudulent misappropriation of money entrusted to the appellant for a specific purpose, namely, to negotiate a settlement of a claim by Long & Co. against the prosecutor Baker, and if that company refused to accept the money, then to pay it into Court on the prosecutor's behalf. A judgment was obtained against the prosecutor for the amount, and then when he goes to the appellant for his money, appellant for the first time sets up the defence that he had some charges to make by way of set-off, namely, in respect of work done for the prosecutor in his professional capacity of accountant. It was clear that before this, when appellant called on Long & Co., he never tendered the amount. The direction to the jury as to

fraudulent intent was none the worse for being at the beginning rather than the end of the summing up. The appeal against the conviction therefore fails. Nothing was said as to the sentence, but as to that, it does not appear an unduly severe one.

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Appeal dismissed.

FRANK FAWCETT(*a*).

Frank Fawcett.

Where on a trial for being a habitual criminal, evidence is given against appellant of matters not included in the statutory notice and which, therefore, he has had no opportunity to answer, the Court will quash the conviction.

Roland Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Leave to appeal was given by this Court on the ground that evidence was admitted wrongly, having regard to the provisions of the Prevention of Crime Act, 1908.

Appellant was released from prison on 14th December, 1909, and the question for the jury, so far as the charge of being a habitual criminal was concerned, was whether he had been since that date up to 20th May, 1910 (with the exception of a period from 17th January to 17th February), leading a persistently dishonest and criminal life. The point I am raising now has been considered in two cases. In *Turner*, (1910) 1 K. B. 346; 3 Cr. App. R. 103; 74 J. P. 81; 26 T. L. R. 112, Channell J. said: "There is no obligation to state in the notice to the prisoner the evidence which is to be given to prove that he is leading persistently a dishonest or criminal life. But the grounds on which it is intended to found the charge must be stated in a real and substantial form. It would not be sufficient to say in the notice that it is proposed to prove that the prisoner is leading persistently a dishonest life or that he is leading persistently a criminal life. I am not sure whether the words "a dishonest or criminal life" point to the distinction between a criminal life led by a person who is constantly committing assaults, or some

(*a*) See p. 91, above.

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crime not involving dishonesty, and a dishonest life, but whether that is so or not, in the opinion of the Court it is not sufficient to state in the notice that the prosecution intends to prove that the prisoner is persistently dishonest, or criminal without being dishonest. The grounds upon which it is intended to prove that the prisoner is leading persistently a dishonest or criminal life must be stated in a general way as grounds of proof, but not as evidence; *e.g.*, it would be sufficient to state that the prisoner is a habitual associate of thieves, or that he is doing no work and has no visible means by which he is earning an honest livelihood, or that he is now doing the very same thing that he did years ago, and for which he was convicted."

In *Waller*, (1910) 1 K. B. 364; 74 J. P. 87; 26 T. L. R. 142; 3 Cr. App. R. 213, the prosecution relied on mere convictions; therefore nothing else could be inserted in the notice. L. Alverstone C. J. said: "We have nothing to add to the judgment of the Court on this matter in *Turner's* case. The Court there said that if the prosecution intend to rely upon any grounds, other than the three previous convictions, for the purpose of establishing the charge of leading persistently a dishonest or criminal life, those grounds must be stated in the notice."

The rule deducible is this, that where the Court is relying upon the convictions, it is unnecessary to put any grounds in the notice; but that it is otherwise where they intend to rely on other grounds.

[CHANNELL J.: They must put the one upon which they propose to succeed.]

Counsel was stopped by the Court.

Bickmore for the Crown. This is a question of "particulars." What we want to know is whether we cannot give such evidence unless we have given notice expressly that we intend to do so. Seven days' notice has to be given. Are the prosecution to be prevented from giving such evidence should facts come to their knowledge during that period, unless they have specially stated their intention to do so, or may they give a notice somewhat less specific but nevertheless fairly indicating the kind of evidence they intend to give?

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In this case we gave notice of the "other grounds" on which we intended to rely in the following terms:—

"That between the 14th December, 1909, and the 20th May, 1910 (with the exception of a period from 17th January to 17th February, 1910), you were given various opportunities of earning an honest living; nevertheless, you returned to your dishonest and criminal life."

In *Turner* this Court laid it down that the prosecution is not bound to give evidence—that it was not sufficient to follow the wording of the Act, but that the "other grounds" must be stated in a general way as grounds of proof. The question is what degree of particulars must be given. This case is on the border line. Our notice is clearly distinguishable from that given in *Turner,* in that it specifies particular dates, and does not leave the matter at large, so that appellant knew the period within which it was necessary to defend himself and his course of life.

In this connection it is necessary to press the significance of the word "returned" in the notice, and to take it in conjunction with the list of convictions served upon him at the same time. In that list there are two under the Prevention of Crimes Act —loitering, and two summary convictions as a suspected person. Does not that "fairly" tell him the kind of evidence which will be given against him when we say he has returned to his old course of life? Had we used the word "associations" instead of "life," the Court would not have hesitated. We say we are going to give evidence against you that you were leading a life similar in all respects as to honesty and criminality to that which you led previous to your release on December 14th, 1909, and that includes criminal associates. If we tell the appellant that he has "returned" to a life of dishonesty and crime we have indicated with sufficient distinctness the class of evidence we intend to give against him. A dishonest life connotes a course of life. I ask the Court to look at the nature of his previous convictions, and then, comparing them with the crime for which he was convicted on June 4th, to say that appellant was clearly going to return to his old mode of life. His was a deliberately planned and preconcerted scheme of stealing from houses, through the instrumentality of his hawker's calling, and the fact that he broke into a house on the day of the late King's funeral indicates clearly that he had lapsed into his old ways.

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[CHANNELL J.: The practical test is whether the notice is such that he can meet the case.]

My submission is that we gave him such notice as ought to have given him ample opportunity of being prepared. There is one other technical point: he had his opportunity of raising this objection at the trial, but he did not avail himself of it.

CHANNELL J.: In this case the only question is whether a sufficient notice within s. 10 of the Prevention of Crime Act, 1908, was given to enable the prosecution to give the kind of evidence which was actually tendered. The clause in question enacts that the notice shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

Now when that Act came into force, the first notices given were simply repetitions of the words of the Act. That, among a considerable number of other questions, came before the Court in *Turner's* case. And what was said in reference to this part of the matter was, that it was not necessary to give the evidence upon which the prosecution intended to rely, but was necessary to give the grounds upon which they expected to sustain the charge; and that it was not sufficient merely to give them in the words of the statute. The intention was to give the prisoner an idea of the nature of the case against him so that he could meet it, and shew it was not true. The only principle in that case is that you must give the grounds, but not the evidence. Obviously the line is rather difficult to draw as to how much you must say. You must, however, say something to draw attention to the kind of evidence you are going to give in order to enable him to meet the case. Now the prosecution did give notice to the appellant and gave what evidence they were aware of in support of the case made by that notice. But, in addition, they gave evidence through Detective-Inspector William Eustace, who happened by chance to be in Court; that officer said he had seen the appellant associating on thirty or forty different occasions with dangerous criminals, and acting in concert with them. Now it is clear the prosecution could not have known that at the time they gave the notice. I cannot help thinking that if the prosecution had known they would have given it as a ground, and put in the notice that he was an associate of thieves. It was an accident that

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they got the evidence at the time. Was the notice such as to cover that case or did it give appellant a fair opportunity of meeting it? The learned Chairman put it very fairly that appellant was trying to get work; but that on the other hand, if the jury chose to believe the evidence of P.-C. Eustace, the appellant was constantly meeting associates of a criminal class, and so put it to the jury that the man was leading a double life. The evidence of Eustace was enough to turn the scale against the appellant.

The notice given would lead him to suppose that the ground upon which reliance was placed was whether or not he availed himself of the opportunities afforded him to earn an honest living. Therefore we think that the notice did not fully cover the case which was in fact made against the prisoner, and was indeed misleading. It seems to us, though we think it is undoubtedly difficult to draw the line, that this notice does not give the appellant a fair opportunity of answering the case. He said P.-C. Eustace had mistaken him for someone else. Whether that is true or not the notice gave him no chance of answering, and therefore we have come to the conclusion that the conviction as a habitual criminal must be quashed.

Conviction as habitual criminal quashed.

MARK DORRINGTON.

Mark Dorrington

There should be a distinction in sentence between a prisoner actually found a habitual criminal and one that is not so found, but whom the Court thinks should be partly punished by preventive detention.

This was an appeal against sentence on leave granted by Grantham J. Appellant pleaded guilty at the Essex Quarter Sessions to a charge of larceny, on April 6th, 1910, and was sentenced on May 25th to six years' penal servitude.

Appellant was convicted of stealing six shillings and a watch of the value of one guinea. He had been convicted in October, 1907, of burglary, and sentenced to three years penal servitude. He was released on ticket-of-leave in January, 1910, and there remained some 270 days on this sentence.

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Appellant in person.

E. H. Tindal Atkinson for the Crown. The appellant was not indicted as a habitual criminal. The main question in this appeal arises on the construction of s. 12 of the Prevention of Crime Act, 1908. That section was dealt with in this Court in the cases of *Flicker* and *Chuter*, 5 Cr. App. R. 79, 1910 (above, p. 79), which were taken together. It was there held that the section in question does not confer any discretion on the judge, and that it is for the Home Secretary in his discretion to commute a portion of the sentence to one of preventive detention. In that case the learned Chairman gave a long sentence, because he was under the impression that a portion of it would be preventive detention. In the present case the learned Chairman said to the appellant in passing sentence: "We have considered this very carefully, but we cannot, after a record of some dozen previous convictions, and one sentence of penal servitude, do other than give you a sentence of penal servitude. . . . The sentence that we are going to give you is one designed, if possible, to fall in with that intention of yours to amend. We are going to give you a sentence of penal servitude, and a longish sentence, but we are going to convey a recommendation to the Home Secretary to convert one half of that sentence into 'preventive detention,' which is very much the same as imprisonment. . . . The sentence is six years' penal servitude, with a recommendation which we will make such as I have described. I find I ought not to have mentioned any term for 'preventive detention'—that will lie with the Home Secretary."

The distinction between those cases and this is that the Chairman in the present case does not profess to exercise any discretion; he expressly leaves it to the Home Secretary. All those cases decided was that the judge cannot take this discretion upon himself where the prisoner is not indicted under the Act, so that if he should pass a sentence of preventive detention in such a case, it can be set aside. But in deliberating whether he will give four or five years' imprisonment or more, he can consider the fact that the Home Secretary has this discretion. The learned Chairman's language cannot be construed to mean "We will take advantage of s. 12 and will adopt the discretion of the

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Home Secretary" ; he expressly guards himself from assuming the discretion.

[CHANNELL J.: If the sentence is justified on the facts, the mere fact that the Chairman hoped it would be turned into preventive detention does not invalidate the sentence.]

Appellant was on ticket-of-leave, and the father was helping him to get work. There was apparently no premeditation in the crime. He had a bad record of convictions.

DARLING J.: The appellant in this case was convicted of stealing a watch belonging to his father, and 6*s*. belonging to his sister, these things having been left on the table in his father's house. The appellant had been several times convicted, but he could not be treated as a habitual criminal under the recent Prevention of Crime Act because he had been at work and was not persistently getting a livelihood by criminal means. When the appellant came out from his last sentence he went back to live with his father, and then it was that he committed this offence. He pleaded guilty, with the result that he would be immediately remitted to prison to serve the 270 days which remained outstanding on his previous sentence of three years' penal servitude, he being at the time of committing this offence out on ticket-of-leave. It was perfectly proper to consider in such a case when deciding what sentence should be imposed, that one effect of the commission of the particular offence would be that imprisonment, automatically, for 270 days would have to be served by the appellant.

But there is another point to be considered: the appellant did not steal these articles in the course of leading a persistently criminal life since he came out of prison; for he had been at work, and so far as we can see, this theft was an isolated act of dishonesty. The question arises: How ought he to be treated? He ought not to be treated as a habitual criminal, but rather as a dishonest man who has been several times previously convicted, who has stolen a watch and 6*s*. in money, and who would automatically go back to serve 270 days under his previous sentence.

In these circumstances we do not think it proper to send the appellant back to penal servitude for this isolated theft. The

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proper sentence would be one of six months' imprisonment with hard labour, which term would, of course, be independent of the 270 days remaining from the previous sentence.

The appeal against sentence will therefore be allowed, and instead of the sentence imposed, we will substitute six months' imprisonment with hard labour.

Sentence reduced.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE AND MR. JUSTICE BUCKNILL.

JOHN WILLIAM SMITH.

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Murder—When evidence of insanity is given for the defence, the direction to the jury should explicitly inform them of their power to return a special verdict under 46 & 47 *Vict. c.* 39 (*the Trial of Lunatics Act*, 1883).

This was an appeal against conviction. Appellant was convicted on June 28th at the Monmouth Assizes before Mr. Justice Lawrance of wilful murder, and sentenced to death.

David. A. J., for the appellant, who was not present. Appellant was convicted of the murder of Ruth Stroud, a married woman. The facts were that Ruth Stroud, who, before marriage, was Ruth Jones, was formerly keeping company with the prisoner, but quarrelled with him in December, 1908. Benjamin Jones, the husband of her sister Edith, giving evidence, said that prisoner formerly lived with him, and on Boxing Day, 1908, had a conversation with him about Ruth Jones, in which he said to the witness that they had parted company; that the prisoner then produced a revolver and said "he would swing for her." The prisoner afterwards ceased to live at Jones's house.

There was really nothing in this remark, made sixteen months before the death of Ruth Stroud, and it was lightly treated by all parties. Yet it was pressed by the judge even at the very last stage of the proceedings.

After the conversation between Jones and the appellant, the girl went away to Ebbw Vale into service. In August, 1909,

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she married Stroud, but left him three months later to live with the Joneses. Acquaintance with prisoner was then resumed, and continued for some time. Jones, in his evidence, said that appellant told him on April 1st (the day of the alleged murder), that he and Ruth Stroud had arranged to go and live together in Ireland, but that on the eve of their departure she changed her mind. This, in my submission, and having regard to evidence of various acts indicating mental disturbance and experts' views thereon, completely unhinged the prisoner's mind, and he became insane. Evidence was given by David Howell Davies, a fellow lodger of the appellant, of a conversation between himself and the appellant at 7.30 p.m. on the 1st April. Appellant came to him and said something in consequence of which Davies remarked: "Why, Bill, you have been drinking." Appellant replied: "Well, Davy, it will be the last drink," and later in the same conversation, said: "I will do the trick to-night." In my submission these words are susceptible of more than one construction; they point as well to suicide as to murder. On the evening of the 1st April, it is said he came to Jones's shop with his revolver and fired a shot. There is no evidence where he aimed this, the first shot. Benjamin Jones says the second shot was aimed at the woman who was kneeling down scrubbing the floor; the third at himself, which caused him to fall backwards. Afterwards the witness Jones ran out of the shop into the kitchen for assistance, and when in the kitchen he heard a fourth shot fired.

Now whether it was the second or the fourth shot that injured the woman was a question which I was entitled to have put to the jury. This point was not adequately dealt with in the summing up. The medical evidence shews that, as regards the fourth shot, there was neither aim nor intelligent act of any description, the prisoner having become stunned by the third shot which he fired at himself.

Again, having regard to the fact that the counter was between the girl and the witness Benjamin Jones, who was standing looking out of the bow window, the witness would have had no little difficulty in seeing everything, especially as appellant is said to have been near the passage and on the same side of the counter as Ruth Stroud

Moreover, neither this witness nor another who was present

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when the fourth shot was fired noticed any blood at the time the second shot was fired. He said in reply that he did not look for it. An artery was severed by the shot that produced the fatal effect, and witness ought to have seen a large effusion of blood if the second shot was the fatal one. Dr. Ryan said that the bullet fractured the vertebral artery, and effusion would take place immediately.

[DARLING J.: You did not cross-examine as to the fourth shot.]

The witness Jones was away in the kitchen when it was fired. My second submission is that the appellant was insane at the time he fired the shots. As to the evidence, I submit it would have been fair to the prisoner to call the prison doctor on behalf of the prosecution instead of leaving me to call him.

[PHILLIMORE J.: Why? It is for you to prove insanity.]

As to the prisoner's condition before the alleged murder, there was the evidence of Davies, the fellow-lodger of the appellant, who swore to the appellant's dejected appearance when he said that he "was going to do the trick," and that "this was his last drink." Davies says he saw something queer about the prisoner all that week; he had eaten nothing, and his eyes were bulging as if he had had no sleep, whereas before this time, he had been friendly, even though not too communicative. All this was practically ignored in the summing up. All this was sworn to as having been his condition for a fortnight before the alleged murder took place. I cannot, however, fix the date the deceased refused to go to Ireland with him. No doubt it might be said that if a man were contemplating the death of some one dear to him, together with his own death, he would hardly be cheerful. But it is nevertheless evidence of insanity, and ought to have been specifically referred to by the learned judge in his summing up.

Further, there is the evidence of Mrs. Pearce, the aunt of the deceased woman's husband, to the effect that Ruth Stroud boasted that she had married Stroud in order to spite Smith, and that

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she had sent him "dotty" by her carryings-on. The witness also said she had seen the appellant pick up the seal on his chain and speak to it, she had also observed twitchings with his hands and great restlessness, and that she was so afraid of him that she had left her house. There was also the evidence of the appellant's landlady, Emma Davies, who said "he looked like a man there was something very wrong with" about a fortnight before the day of the alleged murder.

[PHILLIMORE J.: Do any of these witnesses point to his being insane before this last fortnight?]

No; but there was insanity in the family. The appellant's mother's uncle was in an asylum for some months. Then there are some second cousins of doubtful sanity. In short, consanguinity is a point that must be dealt with, also atavism, or the skipping a generation and reversion to a type. My submission is that I was entitled to have all that evidence considered, and the learned judge never touched upon the evidence of a single one of the various witnesses on these points in his summing up.

There was also the expert evidence of Dr. Hackett, the medical officer of the Usk prison, who saw the appellant on the 4th of April. That officer said that appellant looked very depressed, and looked as if he had not slept; that he seemed to twitch, and was so agitated that he, the witness, ordered him to have two warders instead of one, and to be under constant observation. Later, the witness gave him bromide of potash, and then hyoscine to get him to go to sleep. At the end of a fortnight from that time, though the appellant was better, he shewed by his whole manner a suicidal tendency. The witness also said that if the appellant was in the same condition on the 1st April as when he saw him in prison, he would not be able to control his reason, nor would he have had reason enough to control his acts. Lastly, the witness said that from about the 5th to the 12th of April the appellant was certainly suffering from melancholia, which was a distinct mental disease.

Coming to the summing up, the learned judge commented strongly on the fact that Mrs. Pearce was called to throw dirt on the deceased woman; but I did not rely upon bad character,

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but upon the acts as tending to aggravate the prisoner and unhinge his mind. Again, the learned judge says, referring to the evidence given by Mrs. Pearce, that "they talked about marriage," meaning the appellant and Mrs. Stroud. But there is not a tittle of evidence that they talked this year about marriage: that talk of marriage related to December, 1908. Appellant procured the rings merely for the purpose of deceiving.

Again, the learned judge says that my cross-examination of Benjamin Jones on his inviting appellant to the house after Ruth Stroud had come thither on separating from her husband was worth nothing unless it was pursued to the extent of saying that it shewed "why the man shot the woman," and then the learned judge says: "but the man himself was not put in the box to give evidence, and it may be that he did not approve . . . ." The point of my cross-examination was to shew that from the intimacy and the conversations that the Joneses attached no importance to the appellant's remarks about "swinging for her." and his shewing a pistol sixteen months before the alleged murder. Moreover, I was all along being forced to put the prisoner in the box.

In *Kops* v. *R.*, (1894) A. C. 650, at p. 653; 64 L. J. P. C. 34; 6 R. 522; 70 L. T. 890; 58 J. P. 668; P. C., Lord Herschell C. said: "There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases." There may be cases in which the prisoner should give evidence, especially where he alone can give an explanation. But with regard to the conerete case here, there was nothing to call for the prisoner to be put in the box.

Again, the learned judge said: "Now what you are asked to say by the learned counsel is that there was no evidence that Ruth was shot before the fourth shot was fired." I did not say there was no evidence of her being struck by the second shot. I said, and say now: take all the circumstances together, there was the woman before any shot was fired at all on the floor; she may well have fallen forward from fright. Taking this into account with the fact that neither the second nor the third witness

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saw any blood until after the fourth shot was fired, I submit the probability is she was struck by the fourth shot, which may have gone off by mere muscular action when the prisoner was stunned by the third shot.

Again, the learned judge, directing the jury on the issue of the prisoner's state of mind, said: "You have to ask yourselves the question whether the circumstances . . . . do not shew an indication on his part of having made up his mind to that which he afterwards did, namely, to shoot this girl. You remember he said, 'She won't laugh this day next week.' That was strange; and then, speaking to Davies, Davies said, 'I am surprised at your drinking,' and he said, 'This will be my last drink.' Was that an indication that he had made up his mind to commit this offence—the two things as to swinging for her and shewing the revolver? . . . Did they shew that he knew what he was doing when he made up his mind, and that he was going to do an act of this kind?" But what ought really to have been ascertained was the condition of mind at the moment of committing his offence, not at a time when he was merely contemplating the crime. The learned judge has confused the two things. Why should the episode of 1908 be mixed up with that of April, 1910?

Again, certain equivocal remarks, such as "I am going to do the trick to-night," may refer to suicide; and in summing up the case on such matters as that ambiguous remark, it is the duty of the learned judge to put the alternative constructions to the jury, and, if he omits to do so, the jury are misled.

Again, there was not a single reference by the learned judge to the evidence of David Howell Davies, one of the witnesses for the prosecution, as to the appellant's state of mind, and the evidence as to the insanity in collaterals was never even touched upon.

The learned judge never put to the jury that they were at liberty to find the special verdict contemplated by the Trial of Lunatics Act, 1883, viz., that the prisoner did the act, but was insane at the time he did it. I rely upon the decision in *Jefferson*, 1 Cr. App. R. 95; 72 J. P. 467; 24 T. L. R. 877 (1908), C. C. A., and ask this Court to substitute a special verdict for the verdict found by the jury.

Cranstoun (with him *Marchant*), for the Crown, was not called upon.

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DARLING J.: In this case appellant was indicted for the murder of the woman Ruth Stroud, and we have come to the same conclusion as the jury, namely, that he undoubtedly shot the woman, and that the shot was not the result of any accident or convulsive movement of his finger on the trigger. It requires a great deal of courage to submit that defence to the jury, and even more to submit it to this Court.

The case is a plain and simple one; it was a case of deliberate murder and attempted suicide—a very common case.

What was the appellant's state of mind? The law on this matter is perfectly well known, and we have merely to administer it; and it would be a most dangerous thing to admit these theories of atavism and irresponsibility into the case. According to the expert cited by Mr David, it would seem that at a trial every man is mad except the judge at the moment of giving judgment. But at present we are preserved from such theories by the rules laid down in *McNaughton's* case, 10 Cl. & Fin. 200; 1 C. & K. 130; 4 St. Tr. N. S. 847; 1 Townsend Mod. St. Tr. 314; 8 Eng. Rep. 718; 8 Scott N. R. 595 (1843). The question is whether this man was prevented by disease of the mind from knowing the nature or quality of the act he was doing, and further, was he capable or not of knowing whether it was right or wrong? If he were incapable of knowing whether the act he did was right or wrong, then he comes within the rule in *McNaughton's* case, and would have been entitled to the special verdict of guilty of the act charged, but insane at the time of doing it (Trial of Lunatics Act, 1883). We think there was no evidence that ought to have satisfied the jury that he was either ignorant of the nature or quality of his act or, granting he was ignorant of the nature or quality of his act, that he did not know it was wrong.

There was the evidence of the doctors, but as regards a good deal they said, the less said now the better. Dr. Hackett, however, who was called by the defence, said that when he examined the appellant about a fortnight after the 4th April, the man's condition of mind was normal, and practically the same as that of an ordinary individual; and in answer to the question whether appellant "knows what is right and what is wrong at the present moment," replied, "I should say so." Therefore this man is sane according to the evidence of his own doctor, who had evi-

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dently made up his mind how the act was done long before he came to give evidence at the trial as to the state of appellant's mind.

As to his state of mind at the time of doing the act, you are to look at the evidence before and after the act and throughout the commission of the act. Mr. David pressed upon us that we should take into account the state of appellant's mind weeks before the 1st April: and the insanity of cousins and other collateral relatives years before. But it is not a reason that because he might have been insane then, he is therefore insane later on.

Of course, it was because the man was sane at the trial that Mr. David did not put him in the witness-box, and because he knew that the jury might very easily draw an adverse conclusion.

We have come to the conclusion on other evidence as to the facts that there was no medical evidence that ought to have convinced the jury that the appellant perpetrated this crime when he was insane according to our law. That he was insane according to the evidence of one of these doctors may be true.

Therefore a verdict of guilty was the proper one.

As to the summing up, we think there was not an absolute misdirection as to law nor as to fact. At the same time it is a matter of regret that the case was left at the end without a more perfect direction to the jury in so many words that they could give a verdict of guilty or not guilty, or, if they thought fit, a special verdict under the Trial of Lunatics Act. This was not done, but at the same time the omission did not lead to any miscarriage of justice. In some respects, however, the case was left more favourably to the prisoner than if such a direction had been given.

Therefore this appeal must be dismissed. At the same time there is evidence that the deceased woman boasted she had driven the man "dotty" by her treatment of him in throwing him over, and that upon her refusal to go away with him, he had taken very little food, perhaps had too much to drink, and been under great mental agitation for some considerable time. But then this sort of thing often occurs.

In these circumstances we desire to say that this is a case where the Home Secretary may well be asked to consider whether

it is not one in which he should advise the Crown to exercise the prerogative of mercy in commuting the capital punishment.

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Appeal dismissed.

Solicitors for appellant: *Metcalfe & Sharpe*, for *T. S. Edwards*, Abercarne.

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A suggestion by a prisoner that admissions made by him when in custody were obtained from him by the bribes or threats of a police officer is an "imputation" within s. 1 (f) of 61 & 62 Vict. c. 36 (the Criminal Evidence Act, 1898).

This was an appeal against conviction on grounds involving questions of law. Appellant was convicted on June 13th at the Northampton Assizes before A. T. Lawrence J. of rape, and sentenced to five years' penal servitude.

A. R. Churchill for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. My submission is that questions as to the appellant's character were improperly admitted under sect. 1 (f) of the Criminal Evidence Act, 1898. The questions were allowed on the ground that the nature of the defence was such as to involve imputations on the character of a witness for the prosecution.

Appellant made a statement to Inspector Dunn in which he admitted certain matters which tended to prove that he committed the crime; he signed the statement. At the trial he was asked in examination-in-chief: "I want you to tell us how it came about that you signed it," to which the appellant replied: "They threatened me." The next question was: "Do you mean to say they frightened you?" to which appellant replied: "They gave me 'bacco and one thing and other—matches and all—in the cell so as I should sign it, and I was smoking in his office, too." Upon this Mr. Metcalfe, for the prosecution, with the leave of the learned judge, proposed to put in the appellant's previous convictions on the ground that he had made imputations against

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this witness for the prosecution. The previous convictions were then put in in cross-examination.

In *Rouse*, (1904) 1 K. B. 154; 73 L. J. K. B. 60; 20 Cox C. C. 592; 89 L. T. 677; 20 T. L. R. 68; 68 J. P. 14; C. C. R.; it was held that where the defendant was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" and replied, "No, it is a lie, and he is a liar," the answer amounted to no more than an emphatic denial of the truth of the charge against him, and that he was not liable to be cross-examined as to his previous character.

This was followed in *Grout*, 3 Cr. App. R. 64; 26 T. L. R. 60 (1909). Again, in *Richard Jones*, 3 Cr. App. R. 67; 26 T. L. R. 59 (1909), the defendant in a rape case said that the girl's mother had invented the story. This was held to put his previous character in issue, but it is distinguishable on the ground that making such an imputation was not *necessary* to develope the defence.

In *Sheehan*, 24 L. T. 459; 24 T. L. R. 459; 72 J. P. 232; 21 Cox C. C. 561 (1908), it was held that on a charge of rape the defence of consent does not involve an attack on the character of the prosecutrix.

[PHILLIMORE J.: I think "consent" does involve such an attack. But it would be otherwise if prosecutrix were a common prostitute.

DARLING J.: Appellant does not stop short at a mere denial —which cannot be an imputation. He goes on to say in effect, "You are not fit to be a police constable; you bribed me; you threatened me, and you gave me tobacco."]

Appellant could not raise the question of the inadmissibility of the evidence except by stating how the statement came to be made to the inspector.

[DARLING J.: It might be his only way of defending himself, but it is none the less the same thing as an imputation.]

I rely upon *Preston*, (1909) 1 K. B. 568; 2 Cr. App. R.

24; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280; C. C. A.; but my case is even stronger, for identification proceedings are merely a part of the practice of the police, and it was not relevant in *Preston's* case to put the allegation forward at all. It is otherwise in the present case. I rely also upon *Bridgwater*, (1905) 1 K. B. 131; 21 T. L. R. 69; 74 L. J. K. B. 35; 21 Cox C. C. 737; 91 L. T. 838; 69 J. P. 26; C. C. R. The decision in that case carries the law upon the point to its furthest limits. Appellant was, in my submission, doing no more than developing his defence.

W A. Metcalfe, for the Crown, was not called upon.

DARLING J.: In this case leave to appeal on the facts was refused by Bray J. This Court is of opinion that he was right on the facts to refuse. But this other appeal is a matter of law. Appellant appeals on the ground that the learned judge was wrong in allowing him to be cross-examined as to his character, which was a very bad one.

A prisoner is not liable to this unless he has done something which comes within the exceptions laid down in the Criminal Evidence Act, 1898.

One of the witnesses in this case was a police inspector, who in the course of his duty took down what the defendant said when in custody. The appellant signed it at the instance of the officer, and it was produced in evidence at the trial. Being confronted with this, he could not possibly hope for a verdict of not guilty. Counsel asked at the trial how the man came to sign it, and the appellant replied: "They gave me matches and tobacco," and thereby suggested that the confession had been procured by indirect means. Then Mr. Metcalfe said: "I don't know whether I can cross-examine as to previous character?" and then did so cross-examine him. If the appellant puts it that he was improperly induced to make and sign the statement that was produced, it is difficult to imagine anything more like an imputation on a witness for the prosecution. It is imputed to the witness that, having a man in his custody, he bribed him. and so by that means got him to make the confession.

It is contended by Mr. Churchill that this case comes

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within *Preston* (above, p. 132), in which Channell J. delivered judgment. But on what ground did Channell J. really put the decision? On p. 575 (1909; 1 K. B.) he says: "The present case obviously is very near the line," and on p. 576 he says: "The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it," &c.

The imputation in the case now before us was that the police inspector was not a fit person to remain in the force; had he done what was imputed to him there is no doubt he could have been dismissed from the force; it is the gravest possible imputation, and cannot be excused by the contention that it was the only way open to the appellant of meeting the case against him.

Appeal dismissed.

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, AND MR. JUSTICE PHILLIMORE.

JOHN ALEXANDER DICKMAN.

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The inadvertent comment of counsel for the Crown on the fact that prisoner's wife had not been called for the defence—though in contravention of s. 1 (*b*) *of the Criminal Evidence Act*, 1898—*does not, where it is certain that the jury ignored the comment, constitute a mis-trial, entitling appellant to a* venire de novo.

Identification of a defendant by a witness must be abso utely independent.

Communications to the Home Secretary with reference to an appeal are not evidence, though they may put the Court on inquiry.

This was an appeal against conviction on questions of law, and on reference by the Home Secretary under sect. 19 (a) of the Criminal Appeal Act.

Appellant was convicted of murder on July 6th, 1910, at the Northumberland Assizes before Lord Coleridge, J., and sentenced to death. The date of the murder was March 18, 1910.

Mitchell-Innes, K.C. (with him *Lord William Percy*), for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. In addition to the grounds of appeal as set out in the notice of appeal, I submit that since the case is referred by the Home Secretary, all the facts are at large, and that it is for the Court to consider whether, upon the facts, the verdict is one that can stand. Appellant was called; he said he saw Nisbet at the Newcastle station, and never again. He travelled by the same train a Nisbet to Morpeth, there paying the excess fare from Stannington, which he passed by mistake; he walked to see a friend some miles from Morpeth in the direction of Stannington, was taken ill, rested some time in a field near the road, arrived at Morpeth at 11.6, and took the 1.40 back to Newcastle.

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The grounds of appeal in the notice were (a) misdirection, (b) comment by the prosecution on the omission of the wife of the prisoner to give evidence for the defence, (c) withdrawal of evidence from the jury. The misdirection and withdrawal of evidence involved the same point. The learned judge in his summing up dealt first with the question of motive. Evidence of motive cannot supplement the absence of evidence connecting the appellant with the death of the deceased. If the evidence is weak on that point, evidence of motive cannot be invoked to supply its place. Before ever the question of motive was reached, the evidence connecting appellant with the crime fell far short of what was requisite upon any criminal charge, and *à fortiori* on a charge of murder. The evidence as to identification by the witnesses for the Crown was in the highest degree unsatisfactory. The prosecution called witnesses to prove that appellant was the person who was seen travelling in the same compartment with the deceased, Nisbet, when the train left Newcastle. The learned judge's summing up on Raven's evidence amounts to misdirection. Raven spoke to seeing appellant walking with Nisbet at Newcastle Station. My submission is that this was one of those cases where a man, walking to catch a train, either was overtaken by or himself overtook another man, and then unconsciously walked beside him. It was proved that the two were not talking. Appellant was never conscious of being with Nisbet, and further, though he had seen Nisbet earlier, he never saw him after leaving the booking-office. Raven admits he never saw the two men talking, but the learned judge did not put this to the jury. Appellant further said that he first went to the urinal and then up platform 5 to the hinder part of the train, and if his story, which on this point is consistent with Raven's evidence, is to be believed, it severs him from Nisbet's company at the important moment. Then there was the evidence of Hepple, an old and deaf man, who had for twenty years been a friend of the appellant. Hepple's evidence was no doubt given in perfect good faith, but clearly for the purpose of identification we have to rely upon Hepple's powers of observation solely. His evidence is to the effect that either appellant or his companion had his hand on the handle of the door of the compartment into which both were preparing to enter; the witness then says he walked down the platform for a few paces, and that

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when he turned round the two men had vanished Therefore, having his back to appellant, he was quite unable to say with certainty what happened. Hepple's evidence had a certain force added to it by that of the next witness to identification, Hall; but if Hall's evidence is discredited, that would materially affect the force of the evidence given by Hepple. Hall's evidence was that he, Hall, in the company of a fellow-clerk entered the same train as the murdered man, and that he saw Nisbet and a companion whom he did not know get into an adjoining carriage. Three days later Hall was taken to the police station for the purpose of identifying the person he saw getting into the train, and he there pointed Dickman out as "very much resembling the companion" of Nisbet. More is now known about the circumstances attending the identification at the police station, and an inquiry on that subject was addressed by the Home Secretary to the Chief Constable of Northumberland. The reply from the Chief Constable I now propose to put in.

[The LORD CHIEF JUSTICE: That is not the proper way of bringing evidence before the Court.]

We now know that Hall, before purporting to identify appellant, had been invited to try and see him through a window, and that, subsequently, before the identification, he had a back view of appellant at the police station. In view of the great gravity of the case, I feel I must ask for permission to put the letter in.

The Court refused the application.

Tindal-Atkinson, K.C., for the Crown: Hall is in Court.

Percival Harding Hall, recalled and cross-examined by *Mitchell-Innes, K.C.* (by permission of the Court), said that on March 21 he was taken with another witness, Spink, into a passage at the police station, where some policemen in plain clothes were standing about. They were kept waiting for some ten minutes. Immediately after they arrived, they were invited by one of the persons present, presumably a detective officer, to go outside and look through a window. Witness said he could not remember having had any conversation with the people in the passage, nor

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at that time did he discuss the appearance of the man whom he had come to identify. Witness could not explain why he was invited to look through the window, and he thought it a most irregular proceeding. He saw nothing through the window, and indeed thought he protested that it was ridiculous to expect him or Spink to get a view through the window. They were then taken to the door of a room, in and out of which a few officials were occasionally passing. It was on one of these occasions that they were asked to look through the slightly opened door. They did so. They saw a man sitting in a chair leaning over to another man, and apparently in conversation; the former man had his hat off, and wore a light overcoat. The witness saw the colour of his hair. The witness had no recollection of any conversation with anybody about the appearance of appellant between the time he came back from the window and the time he looked through the door. After this latter view of the man, they went upstairs to the room where they were to identify the man; this was an hour and a half afterwards. When they got into the room he saw that the appellant was wearing a coat similar in colour to that worn by the man he had seen through the door.

Further examined by *Tindal-Atkinson, K.C.*, witness said that on the evening of March 18, which was the evening of the day of the murder, he gave an account at the police station of the appearance of the man he subsequently saw at that station, and that he then described his overcoat as a light fawn overcoat. The impression the witness got in his view through the doorway almost led him to make up his mind that the man was not the man he had seen in the train, because the man at the police station seemed from a back view so much more massive. Spink and the witness had both discussed that at tea, and came to that conclusion.

[The Lord Chief Justice: Although we have our own opinion as to what took place at the police station, we must say that the question of identification by Hall is not so important as it would have been had the case for the defence been that Dickman was not in the train at all.]

Mitchell-Innes, K.C.: I do not propose to deal with the irregularity; but at the same time, although Hall denies that the view through the partially opened door assisted him in his identifica-

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tion, he did see a man wearing a light overcoat, and was able to recognise the colour of his hair

I now propose to put in evidence a statement made by Mrs. Nisbet in response to a request by the Home Secretary for information as to whether she had known Dickman by sight for a number of years.

[The LORD CHIEF JUSTICE: We have frequently declined to listen to statements of the kind you now suggest. No doubt the Home Secretary receives all manner of communications from interested friends or from the prisoner himself. The mere fact of their being addressed to the Home Secretary cannot make them evidence.]

Tindal-Atkinson, K.C.: I may say that Mrs. Nisbet is in Court.

The statement was then allowed to be read on the distinct understanding that it should not be regarded as a precedent.

Mitchell-Innes, K.C.: The statement is this: "I am the widow of J. I. Nisbet, to whom I was married about eighteen years ago. I first knew the prisoner Dickman shortly after I was married, and then only by sight. I was never introduced to him and never spoke to him. On March 18, when speaking to my husband at Heaton Station, the view in profile I got of my husband's companion did not enable me to identify him as anyone I knew. On giving evidence at the police court I never saw the prisoner until I had finished my evidence, when I caught sight of him in the dock. He was in the same position and I had the same view of his profile as I had in the train, and I then recognised him as being the same man. I then fainted, and was carried out of Court."

My submission is that it is curious that Mrs. Nisbet, having a clear view of appellant's profile at Heaton Station, could not recognise him; it was still more curious that she was able to recognise him in Court, when she was unable to recognise him in the railway carriage. Further, the debility and distress under

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which she laboured at the hearing before the magistrates made her evidence unreliable.

[PHILLIMORE J.: She does not say that it was Dickman she saw in the train; she says that the profile of the man she saw in the carriage was the profile of the man in the dock at the trial.]

Leaving the question of identification, I submit that the date when the bag was found is significant. The bag was found down an air-shaft as late as June. It was put there, I suggest, by the real murderer after the hue and cry had ceased. The air-shaft had been searched between the murder and June and nothing found. Dickman could not have put the bag there because he was arrested a day or two after the murder.

[The LORD CHIEF JUSTICE: One would think that a man would have destroyed the bag instead of keeping it and then putting it down the pit. He had from March to June in which to dispose of it.]

It is not impossible that the murder was committed north of Morpeth. The train was a slow one, stopping at five stations between Heaton and Stannington. It should have been put to the jury that there were thus five intervening stations at which interchanges of passengers could take place. The learned judge was under the impression that Stannington was the next station after Heaton. There is no identification of the appellant in the carriage north even of Heaton. The real murderer may well have left the train while in motion; yet the learned judge assumed that the theory of the murder taking place north of Morpeth was practically untenable.

[PHILLIMORE J.: There was doubtless plenty of opportunity for change. But appellant does not suggest that; he says, "I never changed carriages."]

I say that, having regard to the theory of the prosecution of continued identity from beginning to end, this was a point that should unquestionably have been left to the jury. Appellant's

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case, it is true, was quite different; he said he got into the carriage far behind.

It is true appellant took a ticket for a station short of Morpeth, but that he went as far as that place and paid excess fare. He therefore, by giving up a Stannington ticket at Morpeth and paying the excess fare, voluntarily supplied the prosecution with the means of identifying him. Appellant himself gave the police their first information on this point. He was not seen carrying Nisbet's bag at Morpeth, and it is a bag large enough to attract attention

Again, as to the pistols; two must have been used, according to the prosecution, as the bullets found in the body were admittedly different; in other words, the murderer changed pistols. No pistol has been traced to the appellant.

That is the case for the appellant on the facts. On the law my submission is that by sect. 1 (b) of the Criminal Evidence Act, 1898, the prosecution is forbidden to comment on the failure of the wife of the accused to give evidence; counsel for the prosecution did comment on the fact that the appellant's wife had not been called to corroborate the appellant's statement that his wife had cleaned his overcoat. No doubt the jury were subsequently told that they were to dismiss the comment from their minds, and the foreman answered that they had not paid the slightest attention to it. No one can say with certainty what the effect on the individual minds of the jury might have been. The statutory prohibition is absolute in its terms. My submission is that there has been a mistrial, or, as it has been sometimes put, that the trial was a nullity. Consequently there must be a *venire de novo* for a new trial. I refer to the judgments of the minority in *Aaron Mellor,* Dears. & B. C. C. 468; 27 L. J. M. C. 121; 4 Jur. N S. 214; 7 Cox C. C. 454 (1858), a murder trial where by mistake a person not called upon had served on the jury which convicted the prisoner. See also *Fowler,* 4 B. & Ald. 273 (1821).

[PHILLIMORE J.: That decision has been explained in *A.-G. for New South Wales* v. *Murphy,* L. R. 2 P. C. 535; 6 Moore P. C. N. S. 177; 38 L. J. P. C. 53; 21 L. T. 598; 17 W. R. 1047; 11 Cox C. C. 372 (1869).]

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The Court of Crown Cases Reserved had jurisdiction to grant a *venire de novo: Yeadon,* L. & C. 81; 31 L. J. M. C. 70; 9 Cox C. C. 91; 7 Jur. N. S. 1128; 5 L. T. 329 (1861); C. C. R. By virtue of s. 20, sub-s. (4) of the Criminal Appeal Act, 1907, this Court inherits that jurisdiction.

Tindal-Atkinson, K.C. (with him *Lowenthal*), for the Crown, was not called upon.

The Lord Chief Justice: This case has given us occasion for the most anxious consideration. We have examined very carefully all the evidence before the sitting of the Court, so that we might be in a position to appreciate all the arguments.

I desire to mention two points before dealing with the case itself. The first is the attempt to make communications to the Home Secretary evidence in this case. We are sitting here as a Court of law, and possess large powers in certain events which are only to be exercised on the consideration of legal evidence. We do not consider matters brought before us except upon such evidence. No doubt the existence of such correspondence may lead the Court to make further inquiries, and to require the production of further evidence. It must not be supposed, however, that the reading of such communications amounts to the giving of evidence. If it did, people would say that we had allowed our minds to be influenced by them. Therefore we have confined our attention to the evidence given by Hall on oath. We did not think the other further evidence sought to be given was of any importance, and therefore we refused to allow it to be given. The second point I desire to take is that elicited from Hall in cross-examination by Mr. Mitchell-Innes to the effect that when he went down for the purpose of seeing if he could identify Dickman he was first invited by somebody, possibly on behalf of the police, to look through a window, and on doing so did see, sitting alone, the person who was afterwards convicted. We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that

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the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so. In the present case we have come to the conclusion that, although Hall's identification of the actual individual might have been slightly influenced by what had previously taken place, it has so little bearing on the real merits of the case that it is quite impossible for us to interfere with the verdict on this ground.

Now it has been suggested by counsel for the appellant that the murder might have taken place north of Morpeth—that is to say, after the appellant had left the train, it being admitted that in that case the murderer must have left the train while in motion; but there is no substantial ground for thinking that that was the case. The learned judge, in a summing up which is one of the most able I have ever read, dealt with that suggestion. It was not disputed that the appellant was in the train which carried the deceased man, that he took a ticket for a station short of Morpeth, but that he travelled as far as the latter place, where he left the train paying excess fare, and that Nisbet's bag was found down the air-shaft of the Isabella pit about $1\frac{1}{4}$ miles from Morpeth station, and rather nearer Stannington station than Morpeth; and also that the object of the prisoner's journey was to transact some business at Stannington.

I now come to a part of the case which will cause the greatest difficulty to those who may disagree with the conclusion at which this Court has arrived—namely, aye or no, was there sufficient evidence that the man who, between Stannington and Morpeth, murdered the deceased man Nisbet, was the appellant? The evidence was entirely circumstantial, but circumstantial evidence derived from admitted facts proved against a person charged, is often most reliable, because it is not likely to be invented, and if invented, would, in all probability, not fit in with the admitted facts.

We must exclude the fact that he left the train at Morpeth; we must not assume that because he travelled to Morpeth he was necessarily in the carriage with Nisbet. The crucial part of this case is whether there is satisfactory evidence that Dickman entered the

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same compartment with Nisbet at Newcastle. The evidence at Newcastle is, first, that of Raven, who had known the prisoner for eight or nine years, and Nisbet for six years. He saw Nisbet and Dickman come along in the direction of Gate 4 and then did not again see the appellant. The main criticism on this evidence is that the learned judge did not call the attention of the jury to the exact evidence as to whether Nisbet and Dickman were talking together or not. Raven does not speak as to the men being actually in conversation. The theory that Dickman did enter the compartment occupied by Nisbet and then changed to a compartment at the back of the train may be dismissed; it is unlikely in any circumstances. Mr. Mitchell-Innes has pressed on us that because the men were not engaged in conversation that in some way or other throws doubt on the accuracy of Raven's evidence. But the appellant denied he was ever in the same compartment with Nisbet, and the jury were face to face with the contradiction between him and the other witnesses. It is suggested that Dickman went into a urinal a little beyond the bookstall. But looking at the thing in substance, in order to say whether or not Dickman got into the same compartment with Nisbet, it does not seem to us very important whether they were or were not in conversation, or whether Dickman was absent for some little time, and we think that if the learned judge had stopped to discuss such an incident as that it might have misled the jury. We are satisfied that this cannot, from any point of view, alter the result. Omission is not of necessity misdirection. The story is taken up by Hepple who knew appellant well, and who had taken his place further back than the compartment in which Nisbet travelled, and then, as many of us have done, walked up and down outside his compartment for some minutes before the train started. He describes Dickman as going along with his companion; he cannot say whether they were talking, but they were walking in the direction of the engine. Now if Dickman's defence had been that he never went by the train, the argument of Mr. Mitchell-Innes would have been entitled to more consideration. But Hepple has known appellant for twenty years, and, after all, describes a very ordinary incident. The inference from his most natural story is that Nisbet and Dickman stepped into the train together. The theory of the defence is, that if Hepple's evidence is true, Dickman must have come back and got into

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a carriage at the back part of the train. But assuming Hepple to be right, why should Dickman do anything of the kind? It is said Hepple is old and somewhat infirm: but he had known Dickman for no less than twenty years. Moreover, Mr. Mitchell-Innes does not suggest how any physical infirmity affects his evidence.

Then again, Mr. Mitchell-Innes contends that the weight of Hepple's evidence depends on the accuracy of Hall's identification. I could not follow the argument. The recollection of Raven, Hall and Hepple was stereotyped in their minds; this murder is noised abroad, and they have to say what they happen to know about it. Even if you eliminate Hall, it does not weaken Hepple's evidence.

Hall's evidence is very important quite apart from whether his identification at the police station was accompanied by the circumstances described. Hall knew Nisbet well as the Widdrington cashier, and knew the errand on which Nisbet was going. Hall speaks to a part of this case which cannot be said to be in dispute, viz., Nisbet and someone he did not know coming along towards that train and getting into the next compartment. There was, therefore, strong evidence that at Newcastle Station the man who got into the train was Dickman: he was identified by all three men, Raven, Hepple, and Hall. I have left Spink out; I do not rely upon Spink's evidence, but it in no way weakens the combined story of the others.

Now that is the case for the prosecution; they shew that appellant entered the train in the part where Nisbet was. It was quite sufficient to call upon the prisoner for an answer, and when he does elect to give evidence, then what he says with regard to the incident is for the jury to consider. The result of the cumulative observation of these men is to throw doubt on his whole story. He absolutely contradicts the recollection of all these three men. There is no motive suggested why he should enter Nisbet's compartment and then change to another; it is far more important to observe that, assuming he was in company with Nisbet, there was no possible motive suggested why he should come back to the rear part of the train. Therefore the jury having heard it, the judge was justified in leaving it to them. The jury were, therefore, face to face with this contradiction in the crucial part of the whole case.

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At Heaton, Nisbet is seen by his wife, and no one can doubt it from the way she tells the story. Her husband was in the habit of making this journey. She hurries up to Nisbet at Heaton Station, and speaks to another man being there, but was unable to see him very plainly, for he had his coat collar up. She could not say who the man was; but on her examination before the magistrates she says she saw the appellant's profile, and thereupon immediately collapsed in consequence; finally at the trial she says there is no doubt at all about the matter. The passage in the summing up which refers to her evidence is not open to any criticism. At Stannington Station Hall and Spink got out, and one cannot come to any other conclusion than that the murder took place between Stannington and Morpeth.

It is contended that the jury were directed that the train went directly to Stannington from Heaton without stopping, whereas there were several intervening stations at which other persons might well have entered the compartment or got out. But this does not really affect the question at all, when we consider what the appellant's defence was.

Lastly, we have an incident which is not more than an incident, if the jury had evidence before them that appellant got into the compartment at Newcastle, having a return ticket for Stannington, why did he go on to Morpeth? Then there is his account of it. If the jury were satisfied that there was evidence of his going as far as Stannington, it can scarcely be denied there was a strong case for him to answer.

Is there sufficient in Dickman's answer to throw on undisputed points such a doubt that we ought to say that there has been a miscarriage of justice or that the verdict was unsatisfactory? He says he was reading the paper, and allowed the train to go on without noticing it. It is pointed out, too, that the inspector at Morpeth saw no bag, but recollects that a man did get out and pay $2\frac{1}{2}d.$ excess fare. Whether there is a dispute or not as to that incident of the inspector and the bag does not seem to us of very great importance, for he need not have had the bag with him at that moment. The bag is found ultimately down the Isabella pit. It is contended that a doubt is thrown on the case because the bag was not found till June. But the lateness of the discovery does not materially affect the question.

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Again, with regard to the pistols, we cannot, in face of all the circumstances, think it is necessary for the prosecution to trace them to the appellant, nor that the case is at all weakened by so little of the gold and silver being found upon him. These were matters to which the Home Secretary might direct his attention. There is another incident which without these various other points might not have been sufficient. I refer to the blood-stains on appellant's coat.

With regard to the point based on the comment made as to the not calling of Mrs. Dickman to speak to the stains on the coat, it must be remembered that it had been withdrawn from the jury, and they, indeed, stated that they had not even spoken about it, so that it was impossible for the Court to support the contention that there was a mistrial. It was an accidental slip such as must often occur, and its effect, if any, was removed before the verdict was given.

Upon the merits of the case, therefore, we are against the appellant. We have thought it right to examine the case with the greatest possible care, having regard to the fact that it rested on circumstantial evidence. We have no doubt that there was a substantial case for the jury shewing that the murder was committed by Dickman, and there is no ground upon which we can say that the verdict was wrong. The appeal must therefore be dismissed.

Appeal dismissed.

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WILLIAM HENRY COULTER.

William Henry Coulter.

Conviction quashed on the ground that a witness had been allowed to depose to the admission by the prisoner that he had committed offences unconnected with the pending charge.

This was an appeal against conviction, by leave of Bucknill J., and an application for leave to call further evidence. Appellant was convicted of burglary at the Glamorgan (Cardiff) Sessions on June 29, 1910, and sentenced to three months' imprisonment with hard labour.

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E. J. B. Herbert for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Appellant was indicted for burglariously entering the house of one Elizabeth Ann David at Barry. The appeal came before Bucknill J. on an application to call further evidence. The point of law is in regard to the admissibility of certain evidence. I submit that the conviction should be quashed on the ground that evidence was wrongfully admitted of a conversation between the prisoner and a witness, in which the former had given an account of other offences committed by him. In this way previous offences were invoked in evidence. In the course of the case a witness named Perkins, after being examined on the circumstances touching the charge, was asked whether some two or three days after the alleged burglary he did not go for a walk with the prisoner; Perkins admitted he did do so, and that while they were walking the prisoner "mentioned several things." Asked whether there was anything that surprised him, he replied: "Yes; it was concerning several burglary cases—that he had entered the Seamen's Mission, Dock View Road. Before that he asked me certain questions: if I had done any burglary; if I was a sort of burglar? I made no reply. He told me he had a big cop—a halfpenny out of one box hanging in the mission. There was only a halfpenny in it. He had got in and left the crowbar in. He told me a lot about missions two months ago. I do not remember very well if he had spoken about this particular mission. He said he had broken into a leather shop in Thompson Street owned by someone of the name of Davies. He said he had got in by the scullery window by cutting the glass enough for his hand to go through and open the bolt of the windows. . . . On the way down he wished me to go as far as the Ship Hotel, to commit a crime there. . . . The Ship Hotel is at Barry Island. We went there, and while there he asked me if I had the price of a drink. . . . We had half-a-pint apiece. The reason he wanted the half-pint was to go and see how the things were inside. . . . He shewed me the ladder before we went in. He said there was no dog in the house, and that he had been there before begging. The way he did it was to beg and go to the back way to see if there was a dog or not. I did not intend to break in. . . . He said he had several things at Thompson

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Street—a pair of boots, and clothes of some sort. He said he had had tea and sugar and other things."

In his summing up the Vice-Chairman put the substance of this conversation to the jury. He did not tell them that Perkins had been previously convicted.

I submit that the whole of that evidence with regard to the other offences was wholly irrelevant to the issue before the Court. There was no question here of design, system, or guilty knowledge.

[The LORD CHIEF JUSTICE: The proposal to break and enter would not be inadmissible.]

With regard to the admission of offences at the Seaman's Mission, I should mention that there is an indictment for them against the appellant upon which he has not yet been tried.

Lawrie for the Crown. Clearly the conversation was not evidence, but it was not given as evidence; it was given merely as a statement made by him to the boy Perkins. The conversation was mainly important in that it shewed appellant asked the boy about something they proposed to do.

PHILLIMORE J.: In this case we do not think the conviction can be supported. Evidence was admitted of a long conversation with the boy Perkins. Parts of that conversation were and parts were not admissible. We need not here differentiate. The learned counsel for the prosecution had the depositions and knew what had been said; also the presiding Vice-Chairman knew; and either one or both of them ought to have made some attempt to keep the witness in order. Another matter which weighs with the Court a great deal is that the Vice-Chairman says that the evidence is extremely important. I doubt it; but having said so it was equally important to see whether the person who gave the evidence was credible or not. The Chairman said: "We have nothing before us as to the character of this boy, and we have heard nothing at present against him. It is for you to say whether you think he is speaking the truth. It is extremely important in this case." He does not point out that Perkins had been previously in prison, and that one of the police constables,

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though he could not speak to any crime committed by Perkins, admitted that he had heard the boy had been sentenced.

This conviction must, therefore, be quashed, but the appellant will have to stand his trial with regard to the other offence alleged.

Conviction quashed.

[The Lord Chief Justice: He ought to be allowed out on bail, and you had better apply for it in Chambers.]

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, AND MR. JUSTICE A. T. LAWRENCE.

GEORGE CHATWAY AND ARTHUR HOWARD.

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Other previous convictions than the three statutory convictions under sect. 10 (2) (*a*) *of the Prevention of Crime Act of* 8 *Edw. VII., c.* 59, *need not be proved with the same strictness and particularity as the latter:* Franklin (3 *Cr. App. R.* 48 (1910)) *confirmed.*

The headnote to Stewart (4 *Cr. App. R.* 175; 1910), *on this point, to a contrary effect, is erroneous.*

These were appeals against convictions as habitual criminals by leave of Bucknill J., against sentence, and against the order of Bucknill J. refusing leave to appeal against conviction for counting-house breaking.

Appellants were convicted on July 2, at the Surrey (Kingston) Sessions, of counting-house breaking, and as being habitual criminals, and sentenced to five years' penal servitude and five years' preventive detention.

C. St. J. W. Nicholson for the appellants (under s. 10 of the Criminal Appeal Act), who were present. The two appellants were tried jointly on a prosecution by the railway company for breaking into their counting-house at Cheam Railway Station. The circumstances in which the appellants were identified did not shew conclusively that they were the persons who broke into the offices. The whole case really turns on the question of identity. On the night of the robbery, when the alarm was given, the police came up in answer to the whistle, and one of the constables, Prior, making a *détour* round the neighbourhood of Cheam Station, met two men, the appellants, quietly walking along the road, and their conduct was such that they gave rise to no suspicion, although the constable had heard a police-whistle before

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meeting them. My contention is that Prior did not see the real offenders. The facts further shewed that two men had been seen running away from the station. It is a question whether one of the appellants, Howard, was actually seen in the booking office or station itself. This was the second trial, the jury in the first trial having disagreed on this very point of identity. The first jury were dissatisfied because the only time Howard's face was seen was when he was in the ladies' waiting room at 2.30 a.m. With regard to the identification by the railway men, the evidence was that they saw Howard, and one witness, Jordan, said he talked to him. All that was actually seen was a pair of legs disappearing through the ladies' lavatory window. Jordan, a signalman, went round and began talking to someone inside; he strenuously maintained that he then saw Howard and recognised him at the police station later. But the fact remains it was dark at 2.30 a.m., and that the man he saw was supposed to be wearing a light grey suit. Howard was certainly not wearing such a suit. Moreover Prior was some 480 yards from Cheam Station; the road in question was not a blind road, and equally well led away from a field where the appellants said they had been sleeping. I asked Jordan if he saw which door it was out of which he saw the man going. He said he could not see, the reason being that there was an awning which shaded the room to a certain extent. I submit that the formal identification by the railway men at the police station carries the case not a step further. The men who had been arrested were not put up among others in the usual way; they were simply put up together and the witnesses Jordan and Sillens reiterated the evidence they had already given. Jordan had said that he saw two men running away, and that one was short and the other tall; naturally he picked out the short man Howard, when the two were put up together.

[A. T. Lawrence J.: I think the formal identification does carry the case a little further, for if they were honest witnesses they could have corrected themselves.]

I contend that the men ought to have been put up separately.

The main submission I wish to make in this case is that certain questions put in cross-examination were inadmissible. Howard

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was asked what he was, and he replied that he was a shoe maker; then, when asked where he made shoes, he declined to answer. I submit that this question attacked his character and prejudiced him. The distinction between credit and credibility ought to have been observed. I rely upon the Criminal Evidence Act, 1898, which precludes questions tending to shew the prisoner is not a person of good character.

I also ask the Court to allow the appeal against sentence. There was no evidence of any premeditation. The appellants were not armed with any house-breaking instruments, and no money was found on the prisoners. I might suggest that this offence, if it was committed by the appellants, was done on a sudden impulse.

On the conviction as habitual criminals, I make the objection that the prisoners were tried together. Your Lordships have said in a decided case that prisoners ought to be tried separately. *Blake,* 4 Cr. App. R. 275 (1910). I still contend that this rule should be observed notwithstanding the past record of a prisoner. Chatway gave evidence on the trial for being a habitual criminal that he was working. I was unable to examine on the point as I had no information about his record. I submit I was entitled to rely upon the evidence he gave at the trial for counting-house breaking, when he said that he had been working as a dock labourer. I did not address the jury on the charge of being habitual criminals, because the counsel for the prosecution did not touch on the matter. The clerk to the Court conducted that part of the proceedings.

Further, I object because the previous convictions were not proved in the ordinary way, and there is authority to shew that previous convictions outside the three convictions required in the notice must be as strictly proved as the three statutory convictions. *Stewart,* 4 Cr. App. R. 175 (1910).

A. J. Lawrie, for the Crown, was not called upon.

The Lord Chief Justice: In this case the prisoners appeal against conviction as habitual criminals, leave having been granted by Bucknill J., and also against sentence. There is in addition an appeal from the order of Bucknill J. refusing leave to appeal against the conviction for counting-house breaking,

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Very properly Mr. Nicholson has dealt with the leave to appeal against conviction. The facts of the case are that Cheam Station was broken into, and while that was going on, the two men were seen and both identified. Howard was said to have been seen by two railway servants, Sillens and Jordan; Jordan spoke to Howard and the other man heard Howard speak to Jordan. Shortly after, Chatway and Howard were seen in company about 150 yards from the station, going away from there directly. The appellants say they went in company to the races at Epsom, and that they lay down to sleep in a field, while on the way to London, after having had a carousal. Prior, the police constable, says they were quite calm, and the learned Chairman left that matter for the consideration of the jury. At the police-station both men were pointed to by Sillens and Jordan as being the men wanted, and with regard to Howard there is something which takes place shewing more than mere casual recognition. One of the railwaymen said: "You will find if you take his hat off that he has fluffy hair." This is so. In these circumstances it is impossible to say there was no evidence to go to the jury.

Objection was also taken by appellants' counsel to the fact that Chatway was asked what he was and where he made shoes. Learned counsel has contended that because appellant was asked to support his statement that he was a shoemaker by saying where he made shoes, he was therefore being cross-examined as to his character contrary to the provisions of the Criminal Evidence Act, 1898. The cross-examination was certainly not open to any such imputation.

As to the point of identification, the jury came to the conclusion that appellants were the men, and we certainly cannot try the case over again. There is, no doubt, identification and identification. It does not make the matter less a question for the jury because a man comes to the police station a short while after and says, "Yes, that is the man I saw." It is a kind of identification. As regards the convictions as habitual criminals, notice of three previous convictions was given to Chatway, and all three were strictly proved. Chatway also had notice that evidence would be given of fifteen others, ranging from 1905 to 1908. A police officer was called who gave a list of the previous convictions. As to Howard, a police officer named Marshall gave evi-

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dence as to that appellant's previous character. In these circumstances, Mr. Nicholson puts forward the objection that the convictions of Chatway outside the three statutory convictions, and Howard's bad character, were not proved with the same strictness and particularity as the three statutory convictions; and he relies upon the headnote to *Stewart*, 4 Cr. App. R. 175. That is contrary to a judgment of this Court in *Franklin*, 3 Cr. App. R. 48, where I pointed out on the construction of sub-s. 5 of s. 10 of the Prevention of Crime Act, 1908, that where other previous convictions are relied upon to prove a persistently dishonest life, they need not be proved with the same particularity as the three comprised in the notice. I am satisfied that the Court did not decide *Stewart* in the manner suggested by the headnote, or that the Court ever intended to do so.

Then it is said there was no evidence that the appellants were not working during certain periods. No doubt the prosecution ought to make inquiries if there is a substantial interval. But all I can say is that evidence was given with regard to what Howard's habits were; and as to Chatway, there is the evidence about his shoe-making to which I have already referred. In our opinion the suggestion which the appellants now make that they are not habitual criminals is an afterthought.

For these reasons the appeals must be dismissed. As to the sentences, the Home Secretary can of course convert as much of the penal servitude into preventive detention as he thinks fit.

Appeals dismissed.

A. R.

EDWIN PRIESTLEY.

Edwin Priestley.

A conviction will not be quashed because a witness, in re-examination, volunteers inadmissible evidence of another offence not necessarily implicating the defendant.

This was an appeal against the primary conviction, by leave of Bucknill J. Appellant was convicted on June 29th at the Leeds Sessions of housebreaking, and sentenced to three years' penal servitude and five years' preventive detention.

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Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. I cannot say that there was no evidence to go to the jury, but I take exception to certain questions asked in re-examination of a witness, one Walton. Appellant was charged with a man Robinson with breaking into premises belonging to one Spencer on 18th May. Robinson was found in possession of a good deal of the stolen property. Appellant was found in possession of only a very small part, and his case was that the two articles were given to him by Robinson to sell, and that Robinson was quite a stranger to him. The prosecution sought to disprove the latter statement by calling a hawker named Walton to say that he had on 11th May twice seen the appellant in company with Robinson: once in Kirkgate Market, and again in Club Row, two miles away from the market. Appellant's case was that he was alone on that date. My submission is that the questions put to Walton in re-examination ought not to have been put, in that they were not necessary as a result of anything that arose in cross-examination. The appellant, conducting his own defence, asked: "What was there in my behaviour in Kirkgate Market that should make you take so much notice of me?" and Walton replied: "I saw you talking together in Kirkgate Market, and I thought it funny to see you two miles away and talking again." Now upon that the fact is quite plain that the witness had in fact seen the two men together, and that no further questions were necessary. But counsel for the prosecution asked in re-examination, among other things, three questions which elicited the information that on the 11th the house of the witness's landlady, in Club Row, had been broken into. The authorities establish the proposition that evidence in re-examination is admissible to shew another offence only if the evidence elicited by cross-examination is apparently contradictory and the re-examination will serve to explain the contradiction: *Chambers*, 3 Cox C. C. 92 (1848). The questions here were absolutely unnecessary, inasmuch as the witness had given his reasons for noticing these men. There was nothing contradictory in the evidence to justify putting further questions which could only convey to the jury that Priestley had committed a burglary on May 11th.

S. Fleming, for the Crown, was not called upon.

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The Lord Chief Justice: Mr. Mockett has abstained from putting hopeless points. But in re-examination a question is put to Walton, a hawker, who had stated that he had seen two men together in somewhat peculiar circumstances, to which Mr. Mockett takes exception on the ground that it was unnecessary and tended to shew that the appellant had been guilty of another offence. The prisoner had cross-examined Walton very acutely, and asked Walton very particularly whether he really saw himself and Robinson together on the 11th of May. In re-examination to fix the date, Walton is asked whether something happened. The witness began to give information which was not called for by the question or involved in the answer required. He was immediately stopped by the counsel for the prosecution, and it is perfectly plain that it was only re-examination to prove that Walton was accurate in his date.

Appeal dismissed.

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NORMAN FREDERICK MORGAN.

Norman Frederick Morgan.

When the defence is a bonâ fide *dispute as to an alleged overcharge, it is not an "imputation" on the prosecutor to deny his statement.*

To obtain an irrelevant admission of a crime from a defendant in cross-examination is a ground for quashing a conviction.

This was an appeal against conviction on grounds involving questions of law. Appellant was convicted on July 6th, 1910, at the Hants Sessions, of obtaining board and lodging by false pretences, and sentenced to six months' imprisonment with hard labour.

W. Blake Odgers for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was indicted on two counts, the first of which charged him with obtaining food from John McLean, of Aldershot, to the value of £3 9*s*. by falsely pretending that he (the appellant) had an elegantly furnished flat at Shepherd's Bush, and the second of which charged him with obtaining credit by false pretences in incurring a debt to John McLean for £4 4*s*. 4*d*. The prisoner's

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defence was that, when he went to Aldershot in March, he had enough money, and reasonably expected to be able to pay his bill. He also asserted that no bill with items in full detail was presented to him, and that, as he considered the total excessive, he refused to pay. In the course of cross-examination, Mr. Sanders, counsel for the prosecution, passed up to the prisoner a piece of paper folded up, and asked him who had signed it. It proved to be a cheque for £50 in the name of the appellant's mother, and the appellant admitted that he had signed it. I objected on the ground that such questions conveyed a charge of forgery, and ought never to have been asked. The counsel for the prosecution endeavoured to justify his questions and the production of the document on the ground that the appellant's defence was an attack on the character of the prosecutor, but the Court decided against him. My submission is that the evidence was totally inadmissible, and that a general denial of facts is not an attack on the general character of the prosecutor. In many decided cases, the Court has held that the contradiction of the prosecutor by the prisoner in putting forward a genuine defence is not such an attack upon him as to enable the prosecution to put questions to credit or as to previous convictions. The question of forging the cheque was inadmissible, as it had nothing whatever to do with the charge in this case, and the appellant had never attempted to utter it. It was found either on him when arrested or in his lodgings. There was no connexion between this cheque with its fictitious signature and the charge of obtaining board and lodging by false pretences; the forgery was no part of the alleged false pretences. I submit that on the evidence there is no justification whatever for saying that the character of the prosecutor had been attacked, and therefore the questions are contrary to the provisions of the Criminal Evidence Act, 1898. I rely upon *Rouse* (above, p. 132); *Sheean* (above, p. 133); *Bridgwater* (above, p. 133); *Preston* (above, p. 132); *Fisher* (above, p. 51); *Grout* (above, p. 132).

[The Lord Chief Justice: *Sheean* contained a special point, viz., that on a charge of rape, the defence of consent does involve an attack on the character of the prosecutrix. We have ruled that if there is something "tacked on" by the prisoner in his answers so as to attack the character of the prosecutor outside the case, you can put questions to credit.]

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G. A. Sanders, for the Crown. My submission is that the question was admissible to shew the prisoner was guilty on the charge for which he was indicted. He said, "I can pay; he [prosecutor] was declining to give me my bill." I put in the cheque to prove he had not the means to pay at the time he said he would. Appellant said he was in a position to pay, and yet he tried to borrow money; he obtained a few shillings from a Miss Brazier, which he did not repay. I was cross-examining him about these transactions, and then he said: "I should have gone to my mother's and got the amount paid." Whereupon I put in the cheque. The document is clearly relevant. When I asked him who signed it, he answered: "I did that with the intention of sending to my mother on the day I was arrested." The issue was whether he could pay or not.

[The Lord Chief Justice: *Non constat* his mother would not have sanctioned the transaction. Except that you prove he has forged the document, what bearing has it on the case?]

His mother would not have honoured it.

[The Lord Chief Justice: I say it proves only a forgery, and not that he could not get the money from his mother.

A. T. Lawrence J.: You merely assume he has done it with a wrong intent.]

He said he meant to send it to his mother. I did not ask him any such question as, "What use do you intend to make of it?" I submit, further, that the question was allowable on the ground that his answers involved an attack on the prosecutor. He was suggesting that the innkeeper was making exorbitant charges. Counsel for defence cross-examined the prosecutor to shew he had charged more than he was entitled to charge as a coffee-shop keeper, and then would not deliver the bill with items. This line of defence suggests a motive for the prosecution, and goes far beyond *Preston* (above, p. 132).

The Lord Chief Justice: In this case objection was taken at the trial to the line of cross-examination of the appellant,

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who was charged with obtaining board and lodging by false pretences. Now no doubt in many circumstances a great many things may be put in order to negative mistake, or the suggestion that the act was an isolated one and not part of a system whereby persons were defrauded. The questions objected to by Mr. Blake Odgers are not justified on that ground. Mr. Sanders was cross-examining the appellant as to his means and to shew that he had only 5*d.* in his possession. Appellant said he could have obtained the money from his mother. Now if the case had rested there, the result might have been the same. But unfortunately Mr. Sanders put to the appellant a document which had been handed to him by the police inspector. The document was an authority to the London and South Western Bank, Aldershot Branch, to pay to the appellant the sum of £50, and was signed in the name of the appellant's mother. Mr. Sanders then asked who signed it, and the appellant replied: "I did that with the intention of sending to my mother on the day I was arrested." Then counsel proceeded: "That is a fictitious signature, done by yourself," and the appellant agreed that it was. Mr. Odgers then objected to the evidence on the ground that it involved a question of forgery, and ought not to be mentioned. Mr. Sanders then contended that he was entitled on the question of credit to put the document to the appellant, because it was found on him, and because the appellant admitted having signed it. Mr. Sanders contended that if ever there was a case in which the prosecutor's credit had been impeached it was this case. There is no doubt Mr. Sanders did regard the document as a forgery, and intended to put it in as such. It of course conveys a most serious imputation, and we are of opinion that the question is not justifiable on the ground of proving the prisoner's inability to pay, as Mr. Sanders has contended in this Court. It does not prove anything of the kind; it proves that the appellant thought he could get the money from his mother. Reference has been made to-day to the fact that the document was drawn on the Aldershot branch, whereas the mother resides in London. If it was intended by the prosecution to be used as a fraudulent and forged instrument, the forgery is in no way connected with the case to shew that money was obtained by false pretences. The only other ground of justification for putting it in is the assumption of Mr. Sanders that the conduct or nature of the

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defence was such as to involve an imputation on the character of one of the prosecution's witnesses. Apart from what we have already ruled, we have now to consider whether there is anything in this case that involves such an imputation. You cannot turn a defence involving a *bonâ fide* dispute which might justify a man in declining to pay, into an attack on the witnesses for the prosecution. Appellant said he had not intended to defraud, but disputed payment. I can find nothing in either the examination-in-chief or the cross-examination of the witnesses for the prosecution or in the examination-in-chief of the prisoner to bring the case within the section. The charge of forgery was put to the prisoner and pressed by the prosecution; but the position at that stage did not justify this course, for the question was being put on the ground of repelling an imputation on the character of the witnesses for the prosecution. The Court was of the same opinion, and ruled the question inadmissible.

I always feel a difficulty in such a case, for of course the mischief may be stopped. It is quite true the Chairman does say the evidence is not admissible, to which Mr. Odgers replied that the damage had been done. The Chairman says: "I cannot say that." There was nothing said in the course of the summing up to prevent the jury from acting on the inference they may have drawn from the cross-examination of the prisoner. No doubt the statute authorises us to hold in a proper case that the jury may not have been affected by the question that he had forged a cheque. Had the matter not been put as it was it is quite possible that the same verdict might have been found. But we cannot say so here. On these grounds the conviction must be quashed.

Conviction quashed.

A. R.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE DARLING AND MR. JUSTICE A. T. LAWRENCE.

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Alfred Ernest Derrick.

ALFRED ERNEST DERRICK.

Murder—Expert evidence is not necessary to prove handwriting.

This was an appeal against conviction on grounds of law. Appellant was convicted on July 13th at the Chester Assizes before Channell J. of wilful murder, and sentenced to death.

E. T. Nelson for the appellant, who was not present. Appellant was convicted of the wilful murder of a woman with whom he had been keeping company. This appeal is against conviction on the grounds that the verdict was against the weight of evidence, and that certain documentary evidence was wrongly admitted at the trial. The case for appellant was that the woman and himself agreed to commit suicide together, that this agreement was subsequently abandoned, that the woman strangled herself, and that appellant then tried to cut his own throat in consequence. Appellant was convicted on circumstantial and documentary evidence. The circumstantial evidence was very weak, and shewed, if anything, merely that he might have committed the crime. The documentary evidence was composed of a pocket-book found on him, an unstamped envelope addressed to a Mrs. H. Pepperall (mother of the defendant), and in the envelope a letter to his mother written on a leaf apparently torn from a pocket-book. The letter stated that appellant and the deceased were in great poverty and distress, and that they were both going to cut their own throats. This documentary evidence was the main evidence against him, and it lacks corroboration in some important points. On the night

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of the murder, appellant was last seen with the deceased at 9.40 p.m. At 11.10 p.m. her body was found in a field, and a few yards from her Derrick was found bleeding severely from a cut throat. His story of what happened was entitled to receive some consideration. He says they met on the Saturday night and took a lonely walk to Ridge Hill. They had on a former occasion talked of committing suicide together; such an arrangement had, however, been put aside. At 9.40 p.m. that night they met the witness Holloway; he was the last person who had seen the deceased alive; he spoke to their being on apparently good terms at the time. They then sat down on a wall at the bottom of a field, where they had very often been before. They were talking of plans for the future. Appellant said he would go away from the district. Appellant was already married, and his wife lived some distance away; appellant left his wife some time ago; she had had to get many maintenance orders against him. She was on the look-out for him, and sent people after him. It was this difficulty that made appellant say he should leave the district; it irritated the deceased, and she got off the wall and walked away. When next appellant saw her she was lying dead in a field. There was some kind of thin leather ligature round her neck, between which and the back of her neck she had forced her hands. Thus she had strangled herself. Appellant cut the ligature and then, not knowing what he was about, and feeling greatly perturbed, turned the knife on himself. It is true that the doctor's evidence is against the theory that she did it herself. I do not suggest any particular person, but in that district there had been one or two murders unaccounted for, and in fact a man had been arrested. It was put to the jury for the defence, however, that she might have done it herself.

[DARLING J.: When nearly choked one's forces would give way, and the person would come to again. It is almost impossible for a person to strangle himself in the manner suggested.]

Experts have in many cases differed between homicidal and suicidal theories of strangulation. I contend that the police surgeon ought to have been corroborated. He admitted the marks he found could have been self-inflicted. My submission is that the deceased made a noose or knot, and that, having her shawl

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round her neck, the knot or noose left no marks on the back of her neck. The doctor's evidence is consistent with the insertion of fingers in between the ligature and the neck. People contemplating suicide do shew remarkable determination.

[DARLING J.: The doctor says that where there is question between homicidal or suicidal strangulation, one "can only judge by the appearances found in the neck, as to the position and character of the marks produced by the ligature."]

The doctor had no very extensive experience; he drew his conclusions from this particular case.

[A. T. LAWRENCE J.: But there is the evidence of the man Cook, who says he saw the prisoner with a swivel, twisting bootlaces on the same day as the murder.]

Prisoner says he was merely playing with his leather watch-guard. Moreover, there was evidence that the woman had been in the habit of wearing leather straps, similar to the laces produced, at her work in the mill

[LAWRANCE J.: But the mark on the neck was a narrow one; it could not have been caused by a belt.]

These women wear bits of leather very much resembling laces.

My second ground of appeal is that the letter purporting to have been written to his mother was inadmissible; he denied having written it, and therefore his handwriting ought to have been proved in the proper way. What happened was that a policeman named Smethurst was called, who said the writing in the pocket-book was that of the prisoner, because he had seen the prisoner write in the infirmary, and seen him actually writing in that particular pocket-book. The prosecution, in order to prove handwriting, were, therefore, comparing the letter with what was written by the prisoner on another occasion, and calling a police officer to make the comparison for them. Smethurst was shewn the first page of the pocket-book, and then said the handwriting was that of the prisoner.

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[DARLING J.: No one could doubt for a moment that the same hand wrote both.

A. T. LAWRENCE J.: The mere fact that he denies it does not make it inadmissible.]

[*Ellis Griffith*, for the Crown: He admitted it, and said he wrote the letter "for a blind," so that people would not let his wife know where he was going.]

My proposition is that a police officer is not the right person to prove handwriting.

[LAWRANCE J.: Anyone who has seen him write can give evidence.]

I rely on *Crouch*, 4 Cox C. C. 163 (1850), *per* Maule J.

[A. T. LAWRENCE J.: That case was different. Here the prosecution produced writing which one of the witnesses actually saw in the making. You can compare admitted writing with the document in question.]

There is also *Wilbain*, 9 Cox C. C. 448 (1863), and *Harvey*, 11 Cox C. C. 546 (1869), where it was held that a policeman was not an expert in writing. See also Archbold, p. 383, ed. xxiii.

[A. T. LAWRENCE J.: But in those cases the writings could have been handed to the jury for them to draw their own conclusion. That was not done in either of those two cases.

DARLING J.: Channell J. admitted the evidence at the trial because it formed part of what was found on the appellant. The learned judge was of opinion that the case of *Harvey* had nothing to do with the matter, because it really was not necessary to prove the handwriting at all.]

Ellis-Griffith (with him *Reiss*), for the Crown, was not called upon.

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LAWRANCE J.: Two points were taken in this case, (1) that the verdict was against the weight of evidence, and (2) that a certain letter was inadmissible.

This latter question was fully dealt with at the trial both between the learned judge and counsel, and between the judge and the jury. Both the pocket-book and the letter were found upon the prisoner. No one can doubt for a moment that the same person wrote them. In this letter was contained more than a hint of what was going to happen. It was contended by Mr. Nelson that the man had not admitted writing the letter, which was written on a ruled leaf evidently corresponding to the pages of the pocket-book. The learned judge left that question to the jury, and the jury did not hesitate for a moment. That disposes of one point.

Then as to the point that the verdict was against the weight of evidence. The woman was strangled, and the evidence shews that she was strangled by some thin ligature. There were marks left in the front of the neck, but not at the back. The doctor gave his opinion that the pressure must have been exercised from behind, and he gave his reasons. He says the woman could not have done it herself, and he also says that it would be almost impossible for anyone to strangle himself without tying a knot, and that this woman could not have exercised sufficient force to do it herself. There was, he also said, no evidence that any noose or knot had been used; moreover, the marks on the neck did not completely encircle the neck.

Cook's evidence had really nothing whatever to do with the case. He describes how, on the day before the crime was committed, he saw the appellant plaiting or twisting up bootlaces with a swivel; a swivel was found on the appellant. The suggestion was, however, that that might have been the thing used in the strangulation of the woman. Appellant says that he went after her after she had left him, and found her body in a field, that he cut the leather from her throat; but when asked what leather it was, the only answer he can give is that it must have been the belt she wore round her waist.

Now the whole of these matters were left to the jury, and the jury came to the only possible verdict in the circumstances. No doubt it is true that in the letter written to his mother he talks of their contemplated suicide; but he merely inflicted very

slight wounds on his own neck: this could not alter the matter one way or the other.

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In all the circumstances of the case there is nothing in the point taken as to the inadmissibility of the documentary evidence. We think the verdict was a very proper one.

Appeal dismissed.

Solicitor for the Appellant: *W. Worsley*, Stalybridge.

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EDWIN HIGSON.

Edwin Higson.

When a prisoner is on trial for a charge, he should, if it is possible, be indicted on any other pending charge at the same time.

This was an appeal against sentence by leave of Bucknill J. Appellant was convicted at the Knutsford Sessions on the 4th April, 1910, of larceny, and sentenced to twelve months' imprisonment with hard labour.

Ebblewhite for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. On February 4th, 1910, appellant was discharged from prison after serving ten months of a sentence of twelve months' imprisonment with hard labour passed upon him at the Knutsford Sessions for larceny on April 5th, 1909. On February 8th, 1910, he was arrested on a charge of stealing a shirt on March 8th, 1909, and was convicted and sentenced on April 4th, 1910, to twelve months' imprisonment with hard labour. That charge ought to have been brought forward long ago; the police held their hands and waited until the appellant was discharged from prison on February 4th, 1910. If the appellant had been charged with the offence of March 8th, 1909, at his trial on April 5th, 1910, he would have received a very short sentence to run concurrently with the one then passed upon him. I contend that this sentence ought to be quashed, or at least reduced so that he be now a free man. There remain two months of the old unexpired sentence.

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[A. T. Lawrence J.: If his sentence be now made one of four months he will be discharged in August, I take it; but of course this Court has no power to deal with the old sentence, of which two months are unexpired. It is not a *remanet* as in penal servitude.]

In that case your lordships will, I understand, reduce the sentence to one of four months.

Lawrie, for the Crown, was not called upon.

A. T. Lawrence J.: We reduce the sentence to four months. The appellant will therefore be discharged either forthwith or on the 4th of August.

Sentence reduced.

A. R.

Edward Taylor and Alfred Coney.

EDWARD TAYLOR and ALFRED CONEY.

In the case of young habitual criminals, where there may be hope of their reform, the period of preventive detention should begin as soon as possible.

It is not an absolute rule of law that only one prisoner can be tried at a time for being a habitual criminal.

These were appeals against sentence and applications for leave to appeal against conviction as habitual criminals. Appellants were convicted on July 5th, 1910, at the Birmingham Sessions of counting-house breaking and as habitual criminals, and sentenced to five years' penal servitude and five years preventive detention. The appellants were not present and were unrepresented, but put in long written statements.

Sandlands for the Prosecuting Solicitor for Birmingham. Coney has made a long statement in which he sets out his history. It is difficult to understand this statement, but the real ground of appeal seems to be that the police put forward perjured evidence. He says he tried to find work in the interval between coming out from his last term and the time he committed the present offence. There was a conflict of evidence as to his efforts to get work. His wife said he had tried; the detectives

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said he had not, and that he was an associate of thieves. He joined the army in 1900 and left in 1902. He joined under age. Then he joined the militia, and subsequently the 3rd South Staffordshires. Apparently he joined in an assumed name. He was in the army for nearly two years three months. He was discharged at the age of eighteen. There were six previous convictions altogether. He was last released on Feb. 11th and then re-arrested on June 15th. The jury decided against him on the questions of fact. Four men were arrested for this offence, but the other two do not appeal on any ground. It is only fair to say that three of the men, including the two appellants, were tried together on the charge of being habitual criminals. It may be that they ought to have been tried separately, and the jury ought to have had the charge left to them separately: *per* the Lord Chief Justice in *Blake*, 4 Cr. App. R. 275 (1910).

[The Lord Chief Justice: I do not think I intended that as a ruling. It is advisable that prisoners should be tried separately to prevent confusion in the minds of the jury. It was rather an *obiter dictum* than a ruling.

Darling J.: If it could be shewn there had been any confusion this Court might interfere.

Lawrance J.: There is no doubt it is better that prisoners should be tried separately on a charge of being habitual criminals.]

Taylor's was a worse case than Coney. He was older. Since 1902, when he would be sixteen, there are no less than nine convictions. There was evidence to shew that he had never been known to work since he came out of prison early in 1910. He has lived since then with convicted thieves, and is a persistent thief and housebreaker. Taylor, however, on his trial, called a Mrs. Lawrence to say he had been working with her husband. The jury came to the conclusion that he had not made any real effort. He is, however, still a very young man. He is only 26 years of age. In his statement he says it was an accident that he was seen by the other men and that they persuaded him to go with them. This, however, was contrary to the evidence of the

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police, who saw him with the others earlier in the day. The two appellants are expert housebreakers notwithstanding their youth. When they were arrested on the charge for which they were convicted they were in a warehouse in Birmingham in possession of housebreaking implements of the most up-to-date pattern, and had moved a safe with a view to commencing to work on it. They first broke into the Birmingham Corn Exchange and cut a hole in the floor into the premises of a Mr. Dolman. Had they not been surprised they could undoubtedly have opened the safe with the instruments in their possession.

DARLING J.: In this case these two men have often been convicted, and the Court thinks they were properly convicted on the charge of being habitual criminals. They committed a serious offence, and it was obviously right that they should be sentenced to a term of penal servitude to be followed by preventive detention. But they are still young men, though they have spent a good deal of time in prison. Coney is only twenty-four years of age, and Taylor twenty-six. We think the terms of five years' penal servitude which were to be followed by preventive detention, were, in all the circumstances, too long. It appears to us, from the little experience we have of the efficacy of this form of punishment, that in the case of young men, where there may be some hope of reform, the period of preventive detention which might possibly do them some good should begin soon, and not be postponed for two years beyond the period from which it legally may commence. For these reasons we think the sentence should be altered to one of three years' penal servitude—but only on the grounds I have indicated. The period of preventive detention will therefore begin at the earliest moment the law allows.

Sentences reduced.

Solicitor for the Respondents—*J. E. Hill,* Public Prosecutor, Birmingham.

WILLIAM MASON.

The Court will quash a conviction unless the jury are expressly directed that there must be corroboration of an accomplice's evidence.

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William Mason.

This was an appeal against conviction, by leave of Bucknill J. Appellant was convicted on April 5th at the St. Albans Sessions of burglary, and sentenced to six months' imprisonment with hard labour.

Stanley R. Crawford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. In December of 1909 it appears that a burglary took place at the Barnet Steam Laundry. Two brothers named Paice were, on their own confession, convicted of this burglary, and owing to the statement they made to the police, appellant was arrested, charged, and convicted. This statement was to the effect that appellant had been concerned with them in the burglary, and had indeed been the one to suggest and plan the crime. The only evidence to connect appellant with the crime at all was that of these two accomplices. The first brother gave evidence that the appellant participated in the burglary, and then the second brother, who had been permitted to stay in Court all the time, so that he heard what his brother had said, went into the box and confirmed his story. Both brothers had been sentenced before being called as witnesses in the appellant's case, and the result of these proceedings and of the Chairman's summing up was that appellant was found guilty. The Chairman said nothing in his summing up about the necessity for corroboration before convicting on the evidence of accomplices. It is a rule always acted upon that the judge must caution the jury that the evidence of accomplices should not be acted upon in the absence of corroborative testimony.

J. H. Murphy, for the Crown. I submit there was sufficient corroboration not only with regard to the fact, but with regard to the connexion of the prisoner with the burglary. For there was a description of the burglary which tallied with that given by the brothers Paice; further, these two men had made a statement voluntarily implicating appellant, in which they said how the burglary had been planned by Mason, whom they met at

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Barnet. This statement was signed by them, and read out to appellant on his arrest, and all this took place before he was tried by the magistrates. The statement was therefore admissible as corroborative evidence. No doubt the Chairman should have said it was unsafe to convict, but I contend that he was not bound to warn the jury.

I rely upon *Thompson*, (1910) 1 K. B. 640; 79 L. J. K. B. 321; 102 L. T. 257; 74 J. P. 146; 24 T. L. R. 252; 4 Cr. App. R. 45.

Appellant admitted he had met the brothers by his cross-examination of them. He did not give evidence himself, but called his wife. Her story did not agree with what appellant told of himself. She absolutely denied, at first, that there was any truth in the suggestion that these two men had met her husband or sold him a razor. Her story was an *alibi*.

[DARLING J. But where in all this is the corroboration?]

The admission by appellant's wife that appellant met the brothers on December 11th. She first denied, and then admitted the meeting in her evidence.

[A. T. LAWRENCE J.: There is nothing criminal in meeting.

DARLING J.: We want corroboration of their story of planning the crime.]

There is none. The suggestion by the defence was that this was an entire fabrication by the brothers Paice to gratify a petty spite they had against Mason.

[A. T. LAWRENCE J.: That is the very reason of the necessity for corroboration. Of course they would hit upon someone they had met rather than one they had not met.]

It was, no doubt, the duty of the Chairman to direct the jury on the point; he did not do so in terms, but there is a sort of warning in the summing up on the evidence of the brothers Paice. The Chairman said in reference to appellant's allegation of spite, "That is a familiar defence, but it may have some grounds, and

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if so, you will give prisoner the benefit of it." The necessity for giving a caution is not a rule of law, it is only practice.

[A. T. LAWRENCE J.: It seems to me to be common sense; you want something to implicate the accused outside the mere statement.]

It was the breaking down of the *alibi* that satisfied the jury.

[A. T. LAWRENCE J.: But that does not go to corroboration; it was on another occasion (than that of the *alibi*) that Mrs. Mason said her husband met the brothers and they sold him a razor.]

Counsel referred to *Everest*, 2 Cr. App. R. 116, 130; 73 J. P. 269 (1909); C. C. R.

DARLING J.: This is an appeal by a man who was convicted of burglariously entering a laundry and stealing some things therefrom, and sentenced to six months' imprisonment with hard labour. The only evidence against him was that of two people named Paice, who said that the burglary was arranged between themselves and the appellant. If the evidence were true, there would be no doubt he conceived the idea and arranged the matter; but looking at this evidence there is not the slightest corroboration of what the brothers said. It has been suggested that the appellant's wife supplied the corroboration. But even if the appellant and the brothers did meet, there is nothing whatever in the nature of corroboration of the story of those two men that Mason was a party to the crime. The Courts have often laid down, not as a rule of law but of practice of long standing, that there must be corroboration, and that unless the evidence of accomplices be corroborated, it is a fatal defect if a caution be not given to the jury. If the learned Chairman had had more experience of the criminal law he would have been aware of the practice.

There were, therefore, two points of advantage to this appellant. There was no corroboration at all, and the learned Chairman, who bears a most honoured name in the profession, omitted altogether to say one single word about this rule. There is not

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a hint from beginning to end that the jury ought not to convict upon the evidence of accomplices alone. It is unnecessary to discuss any of the cases. There is no question here whether there was adequate corroboration or not, or at what point corroboration was required. There was no corroboration at all.

Therefore the conviction must be quashed.

Conviction quashed.

A. R.

William Fisher.

WILLIAM FISHER.

Where a false pretence or misrepresentation is made to an agent to be forwarded to the principal, the writing communicating the statement to the latter is admissible in evidence against the defendant.

This was an appeal against conviction on grounds involving questions of law, and an application for leave to appeal on grounds involving questions of fact.

Appellant was convicted on 8th July before Pickford J. at the Manchester Assizes of obtaining provender by false pretences, and sentenced to eighteen months' imprisonment with hard labour.

Butler Lloyd for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of obtaining 22 cwt. of provender from one Alfred Royale, the agent of one Alderson, by false pretences. The pretences alleged were (i) That he gave the name of William Parker, and (ii) That he said to the agent of the prosecutor that he was in a fairly large way of business and had fourteen horses. The first allegation was practically dropped at the trial. As to the second, I submit that nowhere will it be found in the evidence that appellant said he "owned" fourteen horses. He was previously a horse dealer, and might well have had horses in his keeping. Further, it was clearly established that there were some horses on his premises at Rumford Street, and another witness spoke to seeing "a horse or two there several times," meaning at Caygill Street, another of appellant's places of business. Appellant was certainly doing some business, whether selling horses for other people or not.

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Again, it is clear on the evidence that it had no definite influence on the prosecutor's mind whether the prisoner had fourteen horses or not. Alderson merely wanted to deal with a man doing some business, and he relied on his agent's (Royale's) statement of what appellant had said to the agent.

Counsel referred to Archbold, p. 601, 23rd ed., as to the distinction between the case where a man is doing no business at all, and where there is an existing though worthless business. *Crab*, 11 Cox C. C. 85; 18 L. T. 370; 16 W. R. 732 (1868); C. C. R.; and *Williamson*, 11 Cox C. C. 328; 21 L. T. 444 (1869), there cited.

Counsel submitted that appellant's representation was very similar to that in *Williamson*. *Simplex commendatio non obligat*.

[Darling J.: You cannot pick out a portion of the statement and then apply the maxim to that portion irrespective of the context.]

Another submission is that a certain postcard was wrongly admitted in evidence. The postcard was written by Royale to Alderson in consequence of a conversation between him (Royale) and appellant, in which conversation the alleged representations are said to have been spoken. The evidence was successfully objected to at the trial, but later on the learned judge allowed it to be put in. The false pretence was alleged to have been made to the agent, and though, no doubt, it will be said to have operated on the mind of the principal, it was not alleged to have been made in order to be sent to the principal.

[A. T. Lawrence J.: But why is it not evidence? Suppose appellant thought the agent was a principal; would it not then be evidence if the agent transmitted it?]

I submit not. The false pretence is here alleged to have been made to Royale, and I submit that a document written by Royale to any third party, unless it be shewn that appellant made the representations with the intention of their being handed on to Royale, cannot be evidence of what passed between Royale

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and appellant. Appellant never saw the document, nor was it in his handwriting.

Laurie, for the Crown, was not called upon.

A. T. Lawrence J.: In this case, William Fisher was convicted of obtaining 22 cwt. of provender by false pretences, and the false pretence alleged was that he "was in a fairly large way of business, and had fourteen horses."

Now the jury found him guilty of making that false pretence, and thereby obtaining provender, and he appeals against the conviction on the ground that the representation is not shewn to have been false: but upon that I do not think the appellant makes out his case. The evidence is that there were two horses, but never more than two, seen, but the evidence as to any other horses is so unreliable that I do not wonder the jury thought the statement as to the fourteen horses was untrue. As the learned judge pointed out, the question is not whether he had thirteen horses, or ten or eight, or any other number; but they, the jury, must look at the whole of the statements together, and decide whether that representation was a true one or not in fact, and whether it was intended to operate on the mind of the prosecutor, Alderson, and did in fact affect his mind.

Looking at the actual facts, it is clear the representation would produce a picture in the mind about as unlike the truth as it possibly could be. The appellant had taken a stable in a back alley, which could afford shelter for no more than two horses; there were no mangers, no stalls, and he was to have the place rent free for three weeks in order to allow him to spend the money to make the alterations necessary for a stable. But he left a week after his first rent was due, without having fitted the place up and without paying any rent. Therefore, when he gave the order to the agent of the prosecutor, the picture is as unlike the truth as it could well be. There is therefore no ground for this appeal on the first contention.

Then it is said that the evidence of the postcard, which was forwarded by the agent to the principal, was inadmissible. I am not clear that I understood the ground of the contention. I take it that it was this: that because it was not shewn to the appellant before

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it was sent, and because it was not in the prisoner's handwriting it could not be used against him. It is erroneous to suppose that that would make such documentary evidence inadmissible in all cases. Here, Royale was known by the prisoner to be an agent for the sale of someone else's provender. The statement or representation was made to the agent, knowing it must be forwarded. Of what materiality can it be whether that statement was committed to writing or not? The statement was made in order to induce a supply of provender, and the appellant must have known that in all human probability it would be forwarded in some way and made the foundation of the principal's action in the matter.

Therefore the appeal fails on that ground too.

Appeal dismissed.

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JOHN BOOTH AND HUGH JONES.

John Booth and Hugh Jones

Answers to questions put with a proper caution by an official, who has power to order the person interrogated to be arrested or to influence others to cause his arrest, are admissible in evidence against that person on his trial, provided the interrogation takes place before it is decided to arrest him and he is not in custody.

Whether he is in custody or not is, semble, *a question for the judge.*

This was an appeal on grounds of law against conviction. Appellants were convicted on July 11th, 1910, at the Chester Assizes before Channell J. of demanding money by means of a forged letter. Booth was sentenced to three months' imprisonment in the second division, and Jones to seven months' imprisonment in the second division.

Artemus Jones for the appellants (under s. 10 of the Criminal Appeal Act), who were not present. Appellants were convicted of demanding money on a forged document and of uttering a forged document, and the submission is that a statement forced from appellant Booth by a series of questions put by a Post Office investigating official at appellant's house was inadmissible in evidence, in that it was not a free and voluntary

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confession, and that Booth was, in fact, at the time in custody. The facts were that a firm of turf agents, Messrs. Archer and Bacon, carrying on business at Middleburgh, Holland, had a system of football competitions, and appellant Booth took part in one of these competitions. On the occasion material to this case it was essential that the coupons containing the winning teams should be posted to Middleburgh not later than 1.30 p.m. on a certain Saturday, and the suggestion by the prosecution is that Booth got Jones, who was in the employment of the Post Office, to stamp the 1.30 postmark on an envelope, and that then Jones took it to Booth, who, having inserted the results in the coupon after learning them from the evening papers, sent them on by post that night, the suggestion being that Jones put the postmarked letter in the proper mail bag for Messrs. Archer and Bacon.

There was absolutely no evidence of that except the statements made by Booth on April 27th to a man named Smith, who calls himself an investigation clerk of the Post Office. Smith went to see Booth with Brookes, a detective, and cautioned him that he was not bound to answer any questions, but that if he did, anything he said would afterwards be used as evidence against him. After giving a reasonable explanation, when it was pointed out to him that the stamp impression had indented the back of the cover but not the coupon (which, had it been there, must have been indented), a statement was made by Booth, viz.: "I admit that the cover was date-stamped before the coupon was put in, by Jones, a postman at West Kirby. I filled up the coupon Saturday evening after learning the results of the matches from a newspaper. I can't say when I gave him the cover." I made my objection to this as evidence before it came out, and there was a long argument, the jury having retired. This statement was read by Smith to Jones, who admitted the truth of it. As Jones admitted the truth of Booth's statement implicating him, it was admitted in evidence against him. But the detective Brookes was present at both the interviews with Booth and Jones, and it is submitted that the men were really in custody. According to Brookes's statement to the magistrate, Booth was practically in custody when he made the statement. Booth's statement was inadmissible because Smith knew, at the time it was made, that an attempt at fraud had been committed.

[A. T. LAWRENCE J.: But according to that, if a police constable knows that a larceny, for example, has been committed, he would never be able to go down and question anyone about it.]

I submit that is not a parallel case. The circumstances here were that Brookes must have known Smith was going to charge Booth with fraud. Instructions from headquarters reached Smith at 6 p.m. after he had sent a telegram; but according to Brookes, appellants were in custody when they made the statements, for he said he would not have let them go.

[LAWRANCE J.: A policeman's eye is not custody.

DARLING J.: If this sort of investigation were not allowed very few crimes would ever be discovered.]

I admit the force of that; but the difficulty of proving the case is no reason why the rules of evidence should be ignored.

I cited to Channell J. his own judgment in *Knight*, 20 Cox C. C. 711; 69 J. P. 108; 21 T. L. R. 310 (1905), and he laid down the rule in this case that "you are entitled to ask questions for your information, as to whether you will charge the man, but the moment you have decided to charge him and practically get him into custody, then, inasmuch as a judge even can't ask a question or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask questions it is inadmissible—what happens is that the judge says it is not advisable to press the matter."

My submission is that the rule was grossly abused; the jury added a rider that the prisoner had their sympathy, and that they "did not appreciate the method taken by the Post Office people of finding out this thing."

J. Lloyd Morgan, K.C. (with him *T. E. Morris*) for the Crown, was not called upon.

DARLING J.: In this case the two appellants Booth and Jones were convicted of demanding money by means of a forged letter, and the forgery was of this kind: that in order to obtain money

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in a competition where people are invited to guess the result of football matches, one of the appellants, Jones, who was a Post Office employee, used a date stamp to forge the time of dispatch of a letter containing a coupon, which letter he despatched to the managers of the competition immediately after the other appellant Booth had communicated to him the result of the matches. It was contended that the conviction could not stand because the fraud had been revealed by answers given by the accused to a person who was sent down by the Post Office to investigate the matter. Now it is true a man named Smith was sent down, who interviewed Booth at his private house. He began by giving the appellant a definite option either to speak or not to speak, and having cautioned him, told him that whatever answers he gave would be put down in writing, and, if the Postmaster-General decided to prosecute, would be used in evidence against him. Booth could have said nothing at all; he did not take that line, however, and gave further answers in order to try to reconcile his earlier statements; and having thus made many answers, these answers were used at the trial against him. They were objected to by his counsel, and after a legal argument at the trial (the jury having retired) as to their admissibility, they were admitted in evidence. It was said they should not have been admitted, as they were not voluntary admissions. It is not necessary to say here what is and what is not a voluntary admission. Cases were referred to in the course of the argument in the Court below, and the principle was put very clearly by Channell J. The evidence before the learned judge was that the person putting the questions had not determined to take the prisoner into custody, and he had to make up his mind whether that was so or not. The learned judge came to the conclusion that there was no evidence to justify him in holding that the interrogator had already determined to take Booth into custody or that he was then practically in custody. I say "practically" because physical custody is not necessary to make such evidence inadmissible.

Now Mr Jones had evidently come to the trial prepared to argue the case. He referred to *Thompson*, (1893) 2 Q. B. 15; 17 Cox C. C. 641; C. C. R., where Cave J., quoting Eyre C. B., says, "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a

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shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected," and then Cave J. went on to say "the material question consequently is whether the confession has been obtained by the influence of hope or fear, and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to shew affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and he, in the event of any doubt subsisting on this head, will reject the confession." Then Channell J. admitted the evidence. It appears to us that Channell J. perfectly understood the proper procedure, and all we can say is that we think the learned judge was affirmatively satisfied that what the appellant had said was not forced from him by fear or some inducement or hope held out by the person putting the questions. In these circumstances, we think there was no infraction of the rule, and that the evidence was rightly admitted. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for Appellants—*Cecil Holden and Cotton*, Birkenhead.

Solicitors for Crown—*Solicitor to the Post Office.*

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THOMAS HENRY KEATING.

There is no appeal from the commutation by the Home Secretary of detention in a Borstal Institution to ordinary imprisonment, under sect. 7 of 8 Edw. VII. c. 59, the Prevention of Crime Act, 1908.

This was an appeal against sentence by leave of Bucknill J. Appellant was convicted on January 28th, 1910, at the Oldham Borough Sessions of shopbreaking, and sentenced to two years' detention under the Borstal system. This sentence was subsequently commuted by the Home Secretary to imprisonment with hard labour for the whole of the unexpired residue.

Ross-Brown for the appellant (under s. 10 of the Criminal

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Appeal Act), who was present. Appellant pleaded guilty. There were no previous convictions against appellant, who had been left an orphan at an early age and, before committing this crime, was apparently an industrious lad. He was sentenced to two years' detention under the Borstal system, and remained there from January 28th to June 13th, when the Visiting Committee reported him to the Home Secretary as incorrigible and as having an evil influence over the other inmates. The Home Secretary then commuted the unexpired residue of the term of detention to one of imprisonment with hard labour under s. 7 of the Prevention of Crime Act, 1908. The effect of the Home Secretary's order, if it remains undisturbed, will be that appellant will have to serve a sentence of imprisonment with hard labour for something like nineteen months for a crime for which he would in all probability have not received more than three or four months' imprisonment with hard labour. In view of the fact that he was then no more than nineteen years of age, and that this was his first offence, I submit the sentence as commuted is far too severe, and such as is never imposed on a youth for a first offence of this character.

[DARLING J.: You are asking us, on the pretext of reviewing the sentence, to interfere with the executive authority of the Home Secretary.]

An appeal lies to this Court where the appellant is not to receive the benefits of the Borstal system. See the decision of Channell J. in *Kirkpatrick*, 73 J. P. 29; 25 T. L. R. 66; 1 Cr. App. R. 170 (1908).

[A. T. LAWRENCE J.: But ought not you to consider that the appellant is incorrigible?]

No. The Court, in reviewing a sentence, is bound by s. 9 of the Criminal Appeal Act, where it is enacted that in no case shall any sentence be increased by reason of evidence not given at the trial.

[DARLING J.: No one proposes here to increase the sentence,

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After all, we have here merely one kind of detention changed into another kind.

A. T. LAWRENCE J.: You want us to shut our eyes to the fact that he is incorrigible.]

My submission is that the effect of a decision adverse to the appellant would be that the Home Secretary could on a mere report of the Prison Commissioners, sentence a man without any trial to imprisonment with hard labour, on evidence forthcoming after his committal to a Borstal Institution.

[DARLING J.: But you must give us reasons to shew why we ought to make his sentence a lighter one. Turning to the report I see that the list of acts of misbehaviour by the appellant while in the Borstal Institution include insolence and inattention on drill, irreverent conduct in chapel, insubordination in gymnasium, and generally, that there were indications that he exercised a harmful influence on the minds of the other inmates.]

The Court ought, nevertheless, to review the sentence on the ground that the sentence, as it now stands, was one which ought never to have been given. It has power to do this under s. 4 (3) of the Criminal Appeal Act. It is clear the learned Deputy-Recorder would never have imposed any term approaching two years' imprisonment with hard labour.

[DARLING J.: If we have, in these circumstances, a power to review the sentence, we can take into account his conduct and pass what sentence we think just.]

In that event the Court would be acting on evidence only forthcoming after the trial.

R. D. Muir (with him *Shawcross*), for the Crown. I should like to submit what I take to be the proper construction of the enactments involved in this case, as other cases will, no doubt, arise, and the Prison Commissioners, together with the Home Secretary, are anxious that this Court should say exactly what their position may be in such a case. My contention is, that

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although there may be technical jurisdiction here under colour of reviewing the original sentence, there is no real jurisdiction to deal with the case at all. The right to appeal under s. 3 of the Criminal Appeal Act is against the sentence passed on conviction on an indictment. The power of the Court is defined in s. 4 (3). No one can suggest that the sentence of two years' detention in a Borstal Institution was an improper sentence, and as no such contention has been or can be put forward, the Court cannot interfere with the sentence. I should like to submit what I contend detention under the Borstal system does mean.

In one aspect it is a reward for committing a crime. Boys are taken from want, placed in an institution where they receive education, are put to agreeable work, can earn gratuities and promotion, and are taught a trade; after this, employment is found for them, and if the wages earned at first are not enough, the deficiency is supplied to make the wage up to a living one until such time as the boy may be able to support himself. S. 1 (1) of the Prevention of Crime Act, 1908, runs: "Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court (a) that the person is not less than sixteen nor more than twenty-one years of age; and (b) that by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court in lieu of passing a sentence of penal servitude or imprisonment to pass a sentence of detention under penal discipline in a Borstal Institution for a term of not less than one year nor more than three years." "Detention under penal discipline" in that section means, or at least includes, detention subject to the powers conferred on the Secretary of State by that Act. What is now contended for is that prisoners should have all the benefits and none of the disadvantages of the penal discipline in a Borstal Institution. There are disciplinary provisions in s. 3 which are beneficial to prisoners. Under that section the Home Secretary has power to transfer a lad from prison to a Borstal Institution. If this appeal be allowed, that power could be made the subject of appeal to the Court of Criminal Appeal. S. 7 of the Act, on the other hand, makes provision

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for the transfer of incorrigibles from a Borstal Institution to prison, and the effect of the argument of appellant's counsel on the construction of that section would be that lads could purposely misbehave themselves in order to get out sooner than they otherwise would. The Home Secretary can, of course, at any time send the appellant back to a Borstal Institution under s. 3. Channell J. in *Kirkpatrick* said: "We should be sorry to throw any doubt on the right and duty of judges to give such sentence as will enable a particular treatment, which seems to be desirable, to be carried out. Such a purpose may require that the sentence shall be of at least a certain length. We must act on the assumption that appellant will be treated under the Borstal system. If not, he can apply to the Home Secretary, and the latter will advise the Crown to reduce the sentence. Further, in that event it would be reasonable that he should be given a right to appeal to this Court, though more than the statutory ten days would have elapsed." But at that time the Prevention of Crime Act had not come into force and the Borstal Institution was a purely voluntary one, *i.e.*, had not received statutory recognition.

[A. T. Lawrence J.: Therefore that decision is not on s. 7 of the Prevention of Crime Act.]

That is so.

Lawrance J.: In this case the appellant, after being admitted to the Borstal Institution, appears to have misbehaved himself on some five or six different occasions, a detailed list of which has just been read by Mr. Justice Darling. The question then arose what was to be done with him. The appellant was absolutely unfit for the Borstal system, and therefore the Home Secretary, acting under s. 7 of the Prevention of Crime Act, 1908, did that which he had power to do. That section enacts that "Where a person detained in a Borstal Institution is reported to the Secretary of State by the visiting committee of such institution to be incorrigible, or to be exercising a bad influence on the other inmates of the institution, the Secretary of State may commute the unexpired residue of the term of detention to such term of imprisonment, with or without hard

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labour, as the Secretary of State may determine, but in no case exceeding such unexpired residue." That is what the Home Secretary has done in this case; he has ordered the prisoner to go to gaol for the residue of the term of two years' Borstal detention. Against that commutation the appellant now appeals, and it is contended on his behalf that the appeal is against sentence. Counsel for the appellant asks us to interfere with the order of the Home Secretary, and the question arises as to what are the powers of the Court of Criminal Appeal in that respect. The Criminal Appeal Act, 1907, s. 4 (3) enacts: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor, as they think ought to have been passed, and in any other case shall dismiss the appeal." That section gives us power (and no other power) to deal with the sentence passed at the trial; that sentence was detention at a Borstal Institution, after which, by the Prevention of Crime Act, the matter falls into the hands of the Home Secretary. We have before us the report of the Prison Commissioners. The report shews the case to be a very serious one, and consequently the Home Secretary has commuted the whole of the unexpired residue into imprisonment with hard labour instead of detention under the Borstal system.

There is no necessity to discuss decided cases, as, in any event, on such a report as the Home Secretary had before him, he seems to have done what he was entitled to do. The case of *Kirkpatrick*, which has been cited to the Court, was decided on November 13th, 1908, whereas the Prevention of Crime Act, 1908, only came into force on August 1st, 1909. Consequently that decision does not affect the Act.

This appeal, therefore, is not a case for our decision, and the sentence will have to stand.

Appeal dismissed.

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BUCKNILL.

HARRY GILLINGHAM.

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On a trial for rape or a similar offence it is desirable that the prisoner should be defended by counsel.

Applicant was tried by Mr. Justice Ridley at Winchester Assizes on 24th June, 1910, on a charge of attempted rape. He was not defended by counsel. He was convicted and sentenced to twelve months' imprisonment with hard labour; he applied for leave to appeal against sentence.

Harry Atkins for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. The prisoner was not defended, and therefore did not cross-examine the prosecutrix with a view to shew consent.

[THE LORD CHIEF JUSTICE: I think I ought to say that when a prisoner is accused of rape or an offence of a similar nature, and is undefended, I invariably ask some counsel to defend him.]

In this case the evidence is consistent with consent. Although the prisoner did not cross-examine to shew consent, yet it is clear from beginning to end of these criminal proceedings that consent was the defence he should have raised had he appreciated its bearing on the case.

BUCKNILL J.: I agree with the Lord Chief Justice that in cases of this kind the trial judge should endeavour to secure the representation of the prisoner by counsel. For obvious reasons, when the charge is one of rape the cross-examination of the

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prosecutrix by an experienced advocate is very important. That being so, and the applicant here having been undefended, if this were not a very clear case we should be disposed to allow the application. But in all the circumstances of the case that appears scarcely necessary in the interests of justice. The prisoner himself admitted that he had torn the prosecutrix's clothes, and said he was very sorry. When that admission is added to the other evidence against him, it is hopeless for him to attempt to explain it away.

Application dismissed.

J. H. M.

John Henry Pearson.

JOHN HENRY PEARSON.

Severity of sentence.

It is not a ground for granting leave to appeal against sentence that, after conviction, information has been given to the Court of alleged previous convictions of the prisoner without strict proof thereof, where there is no reason to believe that the term has been increased in view of such information.

The prisoner was convicted at the Central Criminal Court on 25th July, 1910, of larceny from the person, and sentenced to five years' penal servitude. This was an application for leave to appeal against sentence

Huntly Jenkins for the applicant, who was not present There was no real legal evidence of the previous convictions. Inspector Goss alleged that the prisoner had been convicted in South Africa and in Australia. As regards the convictions in South Africa, he produced a copy of the prison records there, and also certain photographs and finger-prints. It was not proved either that the latter related to the person convicted in South Africa or that they relate to the prisoner. The mode of proving identity is prescribed in 34 & 35 Viet. c. 112, s. 18.

[The Lord Chief Justice: The section expressly says: "the mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction."]

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But the method of proof employed in this case was not an "authorised" mode of proof; it was not legal evidence at all, but the merest hearsay.

[The Lord Chief Justice: This evidence was given after conviction, and not in order to increase the legal sentence that could be passed. It was merely a means of assisting the judge to determine the proper sentence.]

Even so, it is important that the strict rules of evidence should be adhered to. Otherwise, if a mistake is made, the sentence will have been determined not by the actual guilt of the prisoner, but by a mistaken supposition as to his career in the mind of the judge.

It is true that the Recorder rejected the Australian convictions as unproved, and said that he would not let them influence his sentence, but he may have unconsciously allowed them some weight. I am instructed by the prisoner to admit one conviction in South Africa and no more, and deportation from South Africa.

Darling J.: In this case appellant desires leave to appeal against his sentence. It is not here disputed that he designedly robbed a man, with whom he had picked up an acquaintance, of ten bank-notes. That alone might possibly justify a sentence of five years' penal servitude. In addition, however, a conviction in South Africa, and deportation from that country, was either legally proved at the trial, or at any rate is now admitted on behalf of the prisoner by his counsel. The sentence is justified.

Application dismissed.

Solicitors for the Applicant—*Ricketts & Sons.*

J. H. M.

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Edward Feldman.

EDWARD FELDMAN.

Leave to appeal will be granted where the presiding judge has clearly made a mis-statement of important facts in summing up.

Applicant was convicted at Middlesex Sessions on 10th August, 1910, of larceny, but sentence was postponed in order that he might have an opportunity of making restitution or compensation to the prosecutor. This was an application for leave to appeal against conviction and leave to call further evidence.

A. T. Bucknill for the appellant, who was present. Appellant is a German, and the prosecutor a Frenchman. Appellant obtained rooms for the prosecutor at a hotel in London, and agreed to find a market for the prosecutor's invention, a model engine. There was a dispute between them as to payment, and appellant took hold of prosecutor's bag, which contained the model engine and a purse. He believed himself to have a lien on the model engine for the work done by him, and this part of his story was believed by the Court. Prosecutor followed appellant and after some argument got the bag back from him. On prosecutor's return to his lodgings he picked up the purse empty in the gutter, but in view of his confusion and the crowd, it is quite possible that someone other than appellant may have taken the purse out of the bag, rifled it, and then thrown it in the gutter. The Chairman never stated the prisoner's case at all to the jury, and he misstated the evidence. He told them, in his summing up, that appellant seized the bag, ran away, took the purse out, and did not give up the bag till caught. This really can only be described as an invention of the learned Chairman; no such sequence of events appears anywhere in the evidence given at the trial.

The Lord Chief Justice: Leave to appeal against the conviction is granted. The prisoner has leave to call the further evidence desired. As to his own evidence, which was not given on oath in the Court below, if we think it necessary to hear him

on oath at the hearing of the appeal, we will allow him to go into the witness-box. He will be released on bail on his own recognizance for £20.

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Leave to appeal granted.

J. H. M.

MARY ELLEN MOORE.

Mary Ellen Moore.

Murder—Circumstantial evidence.

Appellant was tried for the murder of her infant child, before Mr. Justice Pickford, at Liverpool, on 20th July, 1910. She was convicted and sentenced to death; the sentence was commuted to one of penal servitude for life. This was an appeal against the conviction on grounds of law and fact.

J. E. Singleton for the appellant (under s. 10 of the Criminal Appeal Act), who was not present, submitted that (1) there was no sufficient evidence that the child ever lived; (2) there was no evidence to connect appellant with the alleged murder.

(1) The child must have had an existence separate from that of its mother, otherwise it is not born alive and there is no murder. Now the only test applied here was the hydrostatic test. That test only proves that the child has breathed; but it may breathe either before, during, or after birth (2 Taylor's Medical Jurisprudence, 5th ed., pp. 213, 228 and 230). Dr. Unsworth, the medical expert for the prosecution, said the child lived, but the only test he had applied—namely, the hydrostatic test—does not prove that the child ever did more than breathe. Hence the doctor's evidence is not conclusive. (2) The child was found twelve days after its birth in a back passage wrapped in paper. It has not been shewn how it got there; there is no evidence to shew that appellant put it there. Also, even if she did, there is no evidence to shew that she stuffed into its mouth the paper and umbilical cord which are alleged by the prosecution to have been the instruments of its murder. It is admitted that the child was the appellant's, and that the paper (in which the body was wrapped) came from the house in which she was lodging; but in view of the interval, twelve days, which elapsed between birth and discovery

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—an interval during which no one knew what had become of the child—it is dangerous to convict.

A. R. Kennedy, for the Crown, was not called upon.

The Lord Chief Justice: In this case the sentence of death has been commuted into one of penal servitude. We approach this appeal with the knowledge derived from experience that juries are very reluctant to find verdicts of wilful murder in cases such as this; they feel a not unnatural reluctance to perform what is of necessity a painful duty. But the performance of that duty is essential to the protection of infants; and when juries have done their painful duty against much natural temptation to the contrary, it is important that the Court should not lightly upset their verdict. Bearing in mind this tendency of juries, and looking at the facts of this case, we ask if there is sufficient evidence to support the conviction, and we find that there is more than sufficient. The cause of the child's death was suffocation; two wads of paper and the folds of the umbilical cord had been forced down its throat—the medical evidence shews that it required some exertion of strength and could not have been done by inadvertence. When this fact is added to the results of the hydrostatic test and to the decided opinion of the medical expert, it is quite impossible to say that there was no evidence that the child was born alive. Mr. Justice Pickford very properly told the jury in his summing up that it was not for him to decide the matter; the prisoner had said the child was still-born, the doctor had given reasons to shew that it could not have been so born; it was for the jury to consider those facts and decide the question for themselves. Moreover, Mr. Justice Pickford stated the law on the point to the jury with absolute accuracy, and they must have had it fully before their minds, as Mr. Singleton had put the point fully before them.

As regards the interval of time between birth and discovery of the dead body, there is no suggestion in the evidence that the child was killed by anyone else. The child is admittedly the appellant's, and the paper in which the body was wrapped came from the house in which the girl lived.

Appeal dismissed.

J. H. M.

THOMAS LOATES.

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Thomas Loates.

Where owing to a general misunderstanding, on the trial of a charge of larceny, evidence was wrongfully admitted of another larceny by the prisoner at precisely the same place and time, but the jury were cautioned against the confusion, and there was, in the opinion of the Court, no miscarriage of justice, the Court refused to quash the conviction.

The prisoner was convicted of larceny from the person, at the Bournemouth Quarter Sessions, on 19th July, 1910, and sentenced to eight months' imprisonment with hard labour. Leave to appeal against conviction had been granted by the full Court.

J. G. Trapnell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Certain statements were made by a witness, Thompson, relating to the stealing of another purse by the prisoner, not the purse in respect of which he was being tried. Appellant practically admitted to Thompson, a stranger in a crowd at an aviation meeting, that he had stolen a watch in the crowd. At that moment a gentleman—not the prosecutor—came up and charged appellant with stealing *his* purse, but it was not until after cross-examination that it was discovered that this gentleman was not the prosecutor. Appellant was seen to pass something to someone in the crowd, but prosecutor identified no one. The meeting with Thompson was a little later.

[*W. L. L. Bell*, for the Crown: The robberies took place at the same spot, on the same day.]

Again, an unfair construction was placed upon certain words used by the appellant. The crowd was very hostile to him, and he was glad to escape them by being arrested. That is the true explanation of his words, "That's all right; take me away." But the jury was allowed to regard them as an admission by appellant that he had committed the offence with which he was charged.

Again, Thompson, when recalled, said that the accusation of theft was made before appellant ran away. As a matter of fact, the accusation he referred to was in respect of the other purse—not the offence for which the prisoner was being tried.

I did not take objection at once, because I did not see clearly

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to what the evidence of Thompson referred. The moment its irrelevance became clear I took the objection, and the Recorder ruled out most of the evidence complained of, and told the jury to disregard it. But he mixed up some of it with the evidence properly admissible when he came to sum up, and the jury could not have failed to be very much influenced by it; therefore the verdict ought not to stand. *Fisher* (above. p. 51).

W. L. L. Bell, for the Crown, was not called upon.

DARLING J.: In this case the full Court gave leave to the prisoner to appeal against his conviction on the ground that evidence was admitted which ought not to have been admitted, since it related to another offence. No objection to the evidence was taken as it was given; that was not the fault of counsel for the defence, since neither he nor anyone else could see at first that the evidence related to the other purse, not the purse for the theft of which the appellant was being tried. There was another difficulty in objecting, since some of the evidence, *i.e.*, that of Thompson, who saw the appellant hurrying from the crowd before he spoke to him, related to both purses, and therefore was good evidence; it was not easy to separate it from the inadmissible answers. The same difficulty which faced counsel for the defence as regards taking objections, likewise faced the Recorder as regards the exclusion of the evidence; it was difficult for him to see, as the evidence was given, how to deal with it. But the evidence having been given, and the point taken, he dealt with it properly, and warned the jury not to let it prejudice the case against the prisoner. There is no miscarriage of justice, and the appeal must be dismissed. The sentence will date from the date of the conviction.

Appeal dismissed.

J. H. M.

ANNIE COVE.

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Annie Cove.

Severity of sentence.

Appellant was convicted at the London County Sessions on 8th June, 1910, of assault, occasioning actual bodily harm to another woman, and was sentenced to six months' imprisonment with hard labour. This was an appeal against the conviction and sentence by leave of the full Court.

W. A. Barton, for the appellant (under s. 10 of the Criminal Appeal Act), who was present, examined the new witness whom he had obtained leave to call.

Mary Ann Plume deposed that she was a married woman, and lived next door to appellant's premises. On the night of the assault she saw Mrs. Cove and Mrs. Osborne quarrelling; Mrs. Osborne told Mrs. Cove not to hit her little boy again, but to hit her instead. She used shocking language. They fought in the road, and Mrs. Osborne fell and hurt herself on the kerb of the pavement. Witness could see everything that passed; she saw that prisoner had nothing in her hand when she struck the blow; it was untrue that the prisoner had gone back into the house to get a chopper, or anything else. She heard someone call out, "Look out, here comes a copper" (a slang term for a policeman). It certainly was not, "Look out, here she comes with a chopper."

Cross-examined by *Harvey*, for the Crown: Mrs. Cove came out and stood one hand on her hip and the other on the door. She never went in again until after the accident. Witness had lived in the house for nineteen years. She told someone she had seen the fight, but she did not want to come forward because her daughter might have been kept from returning to Canada.

Barton: Appellant made statements both at the police-court and at the trial, alleging self-defence. The Chairman did not put this point to the jury at all. It is submitted that he should have directed them to consider whether or not the blow was struck in self-defence.

Again, the evidence was quite consistent with the suggestion that the wound was caused by appellant falling and striking her head on the kerb of the pavement. It is true that the medical witness said that the wound could not have been caused by falling,

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but the question is one of common sense, and every-day experience shews that much more surprising wounds are so caused.

Again, the only evidence that anyone called out, "Look out, she has a chopper," was that of the prosecutrix and her husband, That is now contradicted by an independent witness, whose evidence gives a satisfactory explanation of the alleged reference to "chopper." There is no satisfactory evidence that there was a chopper; indeed, a search of the house disclosed none. Lastly, the Chairman made slips in his summing up. He quoted evidence as to an artery having been cut; this was not given at the trial; but the suggestion of the Court that it may have been on the depositions may be accepted. Still, statements on the depositions are not evidence. He talked, too, about the story for the defence having been shifted at the trial from the "pavement" to the "kerb"—as if ordinary people could be expected to weigh every word used in evidence, and distinguish exactly between the "pavement" and the "kerb."

As to the sentence, it is too severe. There was great provocation.

Harvey was not called upon.

BUCKNILL J.: But for the evidence of the doctor, and the nature of the wound, this Court would have come to the conclusion that the evidence did not support a conviction. But the evidence of the doctor as to the nature of the wound renders it impossible to say that the jury had not sufficient evidence before them to justify them in refusing to accept the explanation of the defence. There is no substantial basis for the allegations of misdirection.

As to the sentence, appellant's record shews that she is a violent woman. The sentence is not too severe. It will run from the date of the conviction.

Appeal dismissed.

J. H. M.

STEPHEN NORTON.

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Stephen Norton.

The plea of autrefois acquit *is bad when the criminal act alleged later, though coincident with that of which there has been an acquittal, is in no way incidental to the latter.*

Appellant was convicted at Leeds Assizes on 21st July, 1910, before Lord Coleridge J., of feloniously wounding a little girl by striking her with a stone on the head. He was sentenced to seven years' penal servitude.

He had previously been convicted of a sexual offence against the prosecutrix, in the course of which he struck the blow on which the present charge was founded. The conviction in that case had been quashed by this Court (*a*) on the ground that certain evidence had been improperly dealt with at the trial. This case arose on a second indictment which had been preferred against appellant but not then proceeded with.

Lewis Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The prisoner is entitled to plead *autrefois acquit*. He has already been in peril for the facts alleged in this charge.

[The Lord Chief Justice: The present injury has nothing to do with the sexual offence; therefore the prisoner never has been in peril on this indictment.]

It is submitted that he has been in peril. His identity was the point at issue in both indictments. He has been acquitted by this Court; therefore it is *res judicata* that he is not the person who committed the sexual offence. Now it is common ground that the same person committed both offences, therefore the acquittal is inconsistent with a conviction on this indictment.

[Darling J. referred to the form of the plea "*autrefois acquit*"; it says accused "was lawfully acquitted of the said offence."]

(*a*) See p. 65.

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The question whether or not the offences are the same is a question of *fact*, not *law*, and should have been expressly left as such to the jury. But the judge took it upon himself to decide it as a question of law, and to direct the jury accordingly. Counsel cited the following cases:—*Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. M. C. 101; 33 L. T. 9; 23 W. R. 691; Q. B. (1875); *Elrington*, 31 L. J. M. C. 14; 1 B. & S. 688; 8 Jur. N. S. 97; 5 L. T. 284; 9 Cox C. C. 86; Q. B. (1861); *Miles*, 24 Q. B. D. 423; 59 L. J. M. C. 56; 62 L. T. 572; 17 Cox C. C. 9; 54 J. P. 549; C. C. R. (1890); *King*, (1897) 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329; C. C. R.

F. Pepys Cockerell, for the Crown, was not called upon.

The Lord Chief Justice: This appeal fails. There is only one possible view which would have supported the appeal. If the evidence as to the injury shews that it was essential to the commission of the sexual offence, then it may be that a verdict of acquittal for the sexual offence would support a plea of *autrefois acquit* upon the charge of felonious wounding. We do not decide that point. But in this case the assault is entirely a distinct act from the carnal knowledge. The injury was not caused by the carnal knowledge or anything incidental thereto, but by a stone held by the prisoner. Had the child died from the injury within one year and one day from the date of the assault, a plea of *autrefois acquit*—were it admissible—would defeat a charge of homicide. Since the plea is inadmissible, however, such a charge could be properly preferred in such a case.

Appeal dismissed.

J. H. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE COLERIDGE.

BERNARD MORTIMER.

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A single betting transaction may constitute an user of premises within sects. 1 *and* 3 *of* 16 *&* 17 *Vict. c.* 119, *the Betting Act*, 1853, *if there is other evidence that a betting business is being carried on there.*

A deposit of money, with an undertaking to make bets up to the amount deposited, is within the section.

This was an appeal against conviction under sect. 3 of 16 & 17 Vict. c. 119, the Betting Act, 1853. Appellant was convicted on July 14th at the Southampton Quarter Sessions and fined £25 with £20 costs.

Ricketts for the appellant, who was not in custody.

The indictment was framed under sect. 3 of the Betting Act, 1853. By that section "any person who, being the owner or occupier of any house, office, room or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them . . . shall" be liable to certain penalties. This section refers to the "purposes" set out in sect. 1, which enacts that "no house, office, room, or other place shall be opened, kept, or used for the purpose of . . . any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race. . . ." I am going to argue that the evidence does not shew that these premises were used for any of the purposes made illegal by the section.

The facts were that the Southampton police, in order to entrap appellant, who was admittedly a bookmaker, into illegal book-

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making, communicated with the Portsmouth police, and a Portsmouth inspector wrote a letter to appellant, purporting to come from one Ellison, at Portsmouth, who, so far as the present case is concerned, may be regarded as a non-existent person. This letter, which was written during the first week of May last, said that the writer, who did not wish to have dealings with any local bookmaker, desired to open a "deposit account" with appellant, and would, on hearing from appellant, forward a £5 note, and that commissions were not to exceed that amount without further remittances. The Southampton police could of course easily have gone to appellant's premises to make a bet; they knew quite well he would not have taken it. No answer was received for a fortnight, but on May 24th a letter was received in Portsmouth in which appellant enclosed a book of rules, and said that on receipt of the £5 he would place appellant "on his list of clients." The dummy Ellison then sent the £5 in postal orders, and appellant thereafter on May 26th and 27th made bets with him, the amount of such bets not going beyond the amount of the money deposited. On June 1st, which happened to be Derby Day, the police raided appellant's establishment, among others in the neighbourhood, and found various books of account setting out betting transactions (including that with Ellison), and also some 167 betting slips. The learned Recorder, in summing up, said there was no doubt that a betting business was being carried on; this was never in dispute, and the learned Recorder ought to have told the jury that that fact had nothing to do with the case. It is submitted that the betting slips found were no evidence against appellant, and that there was no evidence that his premises were used for the purposes prohibited by the Act. No doubt the postal orders were paid into the defendant's bank, and no doubt betting slips were found. But all this related to the transactions of one solitary day. Nor was there any contract to bet or to take a bet. The writer of the Ellison letter could have repented of his offer and demanded his £5 back again, and the betting slips, so far from shewing that illegal bets had been made, might have merely recorded past transactions or referred to credit bets, and certainly did not shew that money had been received beforehand. Again, the words, "I will place you on my list of clients," are not evidence against appellant; they did not prove that these clients were per-

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sons with whom the appellant made illegal bets. The clients need not be persons who are going to send money to that house. The important point in this case is to ascertain what was in the mind of appellant at the time he received the postal orders; he has been convicted rather upon what was in the minds of the police. His circular expressly stated that he did no illegal betting, *i.e.*, not at the house.

There was no evidence that the premises had been used for illegal "purposes," except on this one isolated transaction. That is not enough; in *Davies*, (1897) 2 Q. B. 199; 66 L. J. Q. B. 573; 76 L. T. 786; 18 Cox C. C. 618; C. C. R., Lord Russell, C. J., said, "As far as appears from the case, neither these people nor anybody else had ever played at the house before. In my judgment it is impossible to say that the defendant kept, opened, or used the house for the purpose of playing an unlawful game within the meaning of the statute, and on that ground alone the conviction cannot stand."

The learned Recorder misdirected the jury by omitting to tell them that the reception on one occasion only of postal orders as deposed to by the police was not evidence on which they could convict; or at all events he should have directed the jury to consider whether this one instance satisfied them that he was using the premises for the illegal purposes alleged.

[The Lord Chief Justice: That might be true if only books were found, but what would be the use of the slips when the betting is over? Would the jury conclude from the large number of slips that the transactions were all past or all on credit?

[*Charles*, for the respondents: The appellant received one shilling deposit with many of the slips.]

The slips might be a record, before any money passed. It is true the postal orders were cashed, but the matter for inquiry essentially is what was in appellant's mind at the time of receiving the orders.

[Lord Coleridge, J.: It may no doubt be a defence to shew that this happened only on one occasion, but is the prosecution bound to prove more than one?]

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Not entirely bound; they are, however, bound to shew the user for a "purpose" contrary to the section; and they may invite the jury to infer the purpose from the evidence brought before them; but where only one user is shewn, the jury should be perfectly satisfied that the purpose for which the premises were used was the purpose in question. The one case may be perfectly innocent. In substance, this case does not differ from *Davies* (above). The verdict of the jury emphasises the misdirection, for though they returned a verdict of "guilty," they added, "but we think he was very reluctantly led into it in this case." That shewed they had in mind this one case only.

Again, I submit that the money (if money at all) was received on no consideration at all, for at the time the orders were received by appellant there was no contract in existence; Ellison could have repented and demanded his £5 back. There was absolutely no promise or contract of any sort or kind to make any bet. Nor was there any consideration for making a bet. Appellant says, "I will hold the £5 as security, and if you instruct me to make bets, I will." Take an analogous case: suppose I have a number of ships starting on a voyage; I wish to insure them; I look at various forms of policy; and then I say, "I want to be able to insure the ships at the very last moment; can I telegraph at the last moment?" to which the insurer replies, "We do not know you," upon which I deposit money as a guarantee of good faith. Now in such a case as this I am under no obligation whatever to insure.

[Lord Coleridge, J.: Suppose I promise to make a bet on a contingency, is there any difference?]

That would not be a bet. My case, however, is rather that of a cover transaction as in *Universal Stock Exchange* v. *Strachan*, (1896) A. C. 166. It was tantamount to a deposit of £5 to secure payment of differences, but not to abide the event of a wager. In *Universal Stock Exchange* v. *Strachan* Lord Herschell's judgment at p. 173 makes this clear: "It is said that although it may be a gambling contract, yet nevertheless the very provisions of the section against gaming and wagering prevent the plaintiff recovering the security which he deposited with the defendants, inasmuch as it is an 'article of value'

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deposited with them 'to abide the event' of a wager. *That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction.* Here the deposit was for security, and 'not to abide the event.'"

Again, I submit postal orders are not "money" within the section. They did not become money until some time afterwards; they became money when cashed by or on behalf of the defendant. As to the proviso, when there is "no substantial miscarriage of justice," a merely technical case like this is hardly one to bring within the proviso.

It is conceded that *Lennox* v. *Stoddart*, (1902) 2 K. B. 21; 71 L. J. K. B. 747; 87 L. T. 283; 66 J. P. 469; C. A., shews that if the premises are used for a substantial portion of the transaction, the case nevertheless comes within sect. 1 of the Betting Act, 1853, although the receipt of the money did not take place at the office in question. Vaughan Williams, L.J., at p. 32, said, "I do not think it is necessary that the actual receipt of the money should take place in the office. What is forbidden is the use of the house for 'the purpose' of money being received. . . ." The postal orders had to be converted into cash, and though that was done at the defendant's bank, it is not proved when the bank turned them into money. The section says "to pay or give *thereafter* any money or valuable thing"; if bets were made before the conversion into money, then the section can have no application.

It is submitted (1) that there was no evidence to shew that the premises were used for purposes prohibited by the Act, (2) that the receipt of the postal orders was not "for the consideration . . . to pay or give thereafter any money or valuable thing," and (3) that postal orders are not "money" within the meaning of the indictment.

Charles, for the respondents. There was consideration. The essence of the transaction is the circumstances in which the money was paid. It could not be said the money was received on no consideration in face of the letter containing £5 from Ellison saying that he wished to open a *deposit* account, and that the commissions would not exceed the amount deposited without

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a further remittance. In other words, the writer says, "I will send more cash when the £5 runs off." The promise of appellant was made in replying "on receipt of yours, as suggested." On receipt of this letter, appellant promised to put him on the list of clients, and when he received the £5 he made bets for Ellison.

If a bookmaker could say that a receipt of money in those circumstances was not within the statute because there was no consideration, it is difficult to see how any ready-money betting transaction could come within the statute. This £5 was intended to be ready money to set off against a possible loss.

It is submitted the transaction was an "assurance" within sect. 1 of the Act. It certainly would have been if he had written to Ellison and offered these terms.

Nor can it avail the appellant to urge that this was one isolated transaction. Although there was no evidence of people betting on the premises, yet it is material evidence that there was found on the premises the paraphernalia of a betting establishment. Of the 167 slips eleven related to betting on that day and were for very small amounts. This fact, taken with the circumstances of the raid, is sufficient evidence. Appellant's wins and losses were worked out in the ledger, and Ellison's name was entered as a "deposit account."

Ricketts, in reply: As to the word "assurance" in the section, it is submitted that each of the words "assurance," "undertaking," and "promise" is to be construed as meaning "agreement." There was no agreement here; having taken the money, appellant was yet quite able to tell Ellison to take it back again. If Ellison won £10 he would send him that sum and still keep the deposit. Either could withdraw from the arrangement.

The Lord Chief Justice: Betting is not illegal except in certain classes of cases. In this case the appellant was indicted for unlawfully using a certain house for the purpose of certain moneys being received by him as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter certain moneys upon certain events and contingencies of and relating to horse races. It cannot be said that

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the attention of the jury was not properly directed to the question whether or not the appellant used the rooms for such purpose. I have no doubt that this particular transaction did infringe the provisions of the statute. The £5 was sent on the terms that a deposit account was to be opened, and that commissions were not to exceed that amount without further remittances. The meaning of that was, "I do not ask you to give me credit, but to make bets with me up to the amount sent," and the reply was to the effect that on receipt of the £5 Ellison's name would be placed on the appellant's list of clients, a book of rules being enclosed. It is unfortunate if the book shewed anything in the appellant's favour, that no copy of it has been produced.

It seems to me that the transaction between Ellison and the appellant contemplated the naming of horses by Ellison, coupled with an undertaking on the part of the appellant to make bets with him up to the amount of £5. The appellant was not wise enough to see that he was being led on to dangerous ground, but kept the money, made bets, and appropriated portions of the £5 for that purpose. It seems to me that the transaction was within the general words of sect. 3 of the Betting Act, "assurance, undertaking, promise, or agreement, express or implied, to pay, &c."

Then it was urged that the house was not being used for the purposes contemplated by the section, because only this one instance was proved. But it by no means followed from this that the jury might not convict. It was shewn that the appellant was carrying on a betting business, and a number of slips were found relating to bets made on the same day. It seems to me to be a very strong suggestion to say that the jury ought to have found that all these other transactions were not ready money transactions, so far as the backer was concerned. It may well be that the jury convicted unwillingly, but it cannot be said that there was no evidence on which they could convict. With regard to the point taken that the postal orders were not money, I do not intend to express a final opinion; my impression is that there is authority for saying that the receipt of a document which could be turned into money might be the receipt of money. In this indictment the words were "receiving money." I do not

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wish to pronounce an opinion whether the section can be evaded by sending in postal orders. We are all of opinion that even if we felt bound to decide this point in the appellant's favour, we should give effect to the proviso to sect. 4, sub-sect. 1 of the Criminal Appeal Act, 1907, under which we can dismiss an appeal if we consider that no substantial miscarriage of justice has occurred.

Appeal dismissed.

Solicitors for the Appellant—*Lamport, Bassett and Hiscock*, Southampton.

Solicitor for the Respondents—*The Town Clerk of Southampton.*

A. R.

James Spratling.

JAMES SPRATLING.

Apart from the provisions of sect. 6 of 7 Edw. 7, c. 17, the Probation of Offenders Act, 1907, there is an inherent power in a Court of Quarter Sessions to bind a convicted person, who is released on his own recognizance, to come up for judgment when called upon.

Case stated.

Appellant was convicted of larceny on October 21st, 1908, at the Somerset Quarter Sessions at Wells, but was discharged conditionally under s. 1 (2) of 7 Edw. 7, the Probation of Offenders Act, 1907, upon his entering into a recognizance of £20, on conditions set out in a Probation Order, one of which was that he should abstain from intoxicating liquor for two years. On June 29th, 1910, he was brought before the Taunton Quarter Sessions, and evidence was given that he had been drunk on several occasions. It was then submitted that that Court had no power to sentence defendant under s. 6 of the Act in question, as that section only gave such power to a Court of Summary Jurisdiction, and that the Court had no such power under s. 117 of 24 & 25 Vict. c. 96, the Larceny Act, 1861 (as no other punishment had been inflicted on the defendant), or otherwise.

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C. T. Carr for the defendant (under s. 10 of the Criminal Appeal Act), who was on bail. Defendant has broken a condition in the Order; the question is what power has the Court of Quarter Sessions to sentence him.

[Pickford J.: You are not now contending that that Court had no power to insert such a condition?]

No, the point was taken in the Court below, but it is not now open to me to do so, in view of the facts stated in the case.

Whatever powers of binding over and sentencing are possessed by the Court of Quarter Sessions in this case, such powers exist and were exercised solely under the Probation of Offenders Act, 1907. It is true that under the Larceny Act a Court may release offenders upon their own recognizances, but in case of felony this can be done only in addition to some other punishment; here there was no other punishment. Moreover, the Court in this case purported to act under the Probation of Offenders Act, 1907, and followed its express words. That Act is a code, complete in itself; it provides a complete machinery of probation officers, &c. Where offenders are dealt with under that Act, the powers of the Court are confined to the powers conferred by the Act.

Reference to the Act shews that two classes of offenders may be made the subject of Probation Orders. First, any person charged before a Court of Summary Jurisdiction and not convicted or sentenced (s. 1, sub-s. 1); second, any person convicted on indictment and not sentenced (s. 1, sub-s. 2). The first class may be bound over to appear for conviction and sentence, the second class to appear for sentence only.

The powers of sentence in case of offenders who fail to observe the conditions of their release are governed by s. 6. Sub-ss. (1)—(4) thereof use the words "conviction *or* sentence": sub-s. (5) the words "conviction *and* sentence." Under sub-s. (5) the Court may "convict *and* sentence" the offender for the original offence. The words "convict *and* sentence" cannot apply to an offender already convicted. There is, therefore, no power under this Act or otherwise to sentence this offender.

[The Lord Chief Justice: Has not a Court inherent power

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to release a prisoner upon his own recognizances? Does not such power allow a Court in such a case to pass sentence for the original offence in case of breach of the conditions of release?]

This is breach of a special statutory condition as to abstaining from intoxicating liquor. This condition can be inserted only in cases governed by the Probation of Offenders Act, 1907. The evidence is that apart from drink the man is of excellent behaviour. In case of misdemeanours there is power under the Larceny Act to release a prisoner upon recognizances in lieu of or in addition to other punishment; in case of felony such power exists only in addition to other punishment, *e.g.* a day's imprisonment.

If there be no power of further sentence in this case, the Probation of Offenders Act, 1907, is not made entirely valueless. The Court which applies it relies upon moral influence and supervision instead of other punishment.

Finally, this is a penal statute, restrictive of liberty; it must be construed strictly according to the spirit and according to the letter. If this be a *casus omissus*, construction must not be strained to cover the case.

C. A. S. Garland for the Crown. The question is, is there power to sentence under s. 6 of the Probation Act, 1907? That provides for "conviction and sentence" only, *i.e.* by a Court of Summary Jurisdiction. Probably it is a *casus omissus*. But (1) there is power in the present case in the Court to sentence under s. 1 (2) of Probation Act, which provides for the offender being bound over to come up for sentence when called on, and under which, it is submitted, sentences can be postponed or imposed independently of sub-ss. 2 and 6. (2) Archbold, ed. 22, p. 220, states that the Court has general power to bind over to come up for sentence, *in lieu* of punishment, but no authority is cited for this, and it is doubtful whether such general power is not confined to misdemeanours, though in practice judges have frequently so bound over in all cases indiscriminately. See Russell on Crimes, p. 218, ed. 7, and *Dunn*, 12 Q. B. 1026; 18 L. J. M. C. 41 (1847); Ex. Ch., there cited; the power so to deal with an offender in case of *felony* seems to depend upon

specific enactments and to be a power to do so *only in addition to*, and *not in lieu of* punishment.

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James Spratling.

C. a. v.

PICKFORD J.: The appellant in this case was convicted at the Somerset Quarter Sessions of larceny, and was required to enter into recognizances under the Probation of Offenders Act, 1907, 7 Edw. 7, c. 17, s. 1, sub-s. 2, to appear for sentence when called upon. The recognizance contained conditions authorised under the circumstances by the Act, and for a breach of one of these conditions the appellant was called upon to appear before the Quarter Sessions for sentence. It was not disputed that he was properly so brought before the Court under s. 6 of the Act, but it was contended that there was no jurisdiction to pass sentence on him because s. 6, sub-s. 5, of the Act only applied to persons bound over to appear for conviction and sentence and does not apply to a person bound over to appear for sentence only. S. 1 of the Probation of Offenders Act contemplates two classes of case. Sub-s. 1 applies to persons tried before a Court of summary jurisdiction and empowers the Court, if it thinks that the charge is proved, without proceeding to conviction, to require the prisoner to enter into recognizances to appear for conviction and sentence when called on. Sub-s. 2 applies to persons convicted on indictment and enables the Court to require them to enter into a like recognizance to appear for sentence only.

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S. 6, sub-ss. 1 to 4, provides that a prisoner bound over to appear for conviction *or* sentence may be brought before the Court, and sub-s. 5 empowers the Court to convict *and* sentence a prisoner bound over to appear for conviction and sentence without further evidence.

It was contended that the substitution of the word "and" for the word "or" shewed that the sub-section was intended only to apply to the class of cases contained in s. 1, sub-s. 1, and that, therefore, there was no power to sentence this appellant. For reasons given hereafter, we think it very likely that sub-s. 5 was only intended to apply to that class of cases, but we think that whether that be so or not the Court had jurisdiction, apart from any special provision of the Probation Act, to pass sentence. We think that, apart from any statutory provisions,

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James Spratling.

the Court of Quarter Sessions had power to bind over the appellant to appear for sentence when called upon.

It was not, and could not be, denied that that Court had power to sentence him at the time he was convicted. We think it equally clear that it had power to postpone sentence till a future day. It also had power to release him on bail on his own recognizances. To bind him over to appear for sentence when called upon is only to postpone sentence, and in the meanwhile release the prisoner on bail. This power has constantly been acted upon, and we see no reason to doubt that it exists, and that the jurisdiction to pass sentence still remains in the Court. We must not, however, be taken to decide that the Court can postpone sentence *sine die* against the will of the prisoner. In this case the appellant was bound over under the provisions of the Probation Act. Such provisions may confer a larger power of inserting conditions in the recognizance than existed before, but they cannot, in our opinion, divest the Court of the jurisdiction to pass sentence which it possessed independently of the Act. We think, therefore, that it is immaterial whether s. 6, sub-s. 5, of the Probation Act applies to this case or not.

We were referred to the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 117, but it does not seem to us to apply to this case, as it gives power to make the requirement to enter into recognizances a part of the sentence of the Court in lieu of, or in addition to, punishment by way of fine or imprisonment.

It seems to us, however, that in all probability sub-s. 5 was not intended to apply to this case, but only to cases under s. 1, sub-s. 1, and that it was considered unnecessary to confer a special power to pass sentence in cases like the present because it was recognised that such power already existed. In cases under s. 1, sub-s. 1, which are tried before a Court of summary jurisdiction, it must be remembered that before the Court can pass sentence it must convict the prisoner. Although the Court before which he is brought for a breach of his recognizance may be the same Court, it may consist of members other than those who were present on the day of trial, and it may very well have been considered that they could not, in the absence of special provisions, convict a prisoner without having evidence before them to prove the original charge, while in the case of a convicted prisoner

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James Spratling.

no such difficulty could arise. This view is strengthened by the fact that the Probation of First Offenders Act, 1887, 50 & 51 Vict. c. 25 (repealed by the Probation of Offenders Act, 1907), which dealt only with convicted prisoners such as are mentioned in s. 1, sub-s. 2, of the Act of 1907, contained no express power to pass sentence and assumed the existence of the jurisdiction which we have held to exist. In s. 2, sub-s. 2, that Act provides for the course to be pursued if the offender be not brought forthwith before the Court having power to sentence him, and provides that he may be remanded until the sitting of a Court having power to deal with his original offence. The Court mentioned in that sub-section is not defined, but it can only be the Court before which he was tried, and the jurisdiction of that Court to pass sentence seems to be assumed.

We think, therefore, that s. 6, sub-s. 5, was probably added for the purpose of providing for a new class of cases introduced by that Act, and purposely refrained from dealing with other cases, but that there was power to pass sentence apart from that section altogether.

The case must be remitted to the Quarter Sessions that sentence may be passed on the appellant.

Case remitted to Quarter Sessions for sentence.

Solicitors for the Crown—*C. O. Bennett*, Bruton.

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE COLERIDGE.

PERCIVAL BRUCE.

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Percival Bruce.

As a general rule, a sentence of concurrent penal servitude and hard labour is to be deprecated.

This was an application for leave to appeal against concurrent sentences passed by the Recorder of seven years penal servitude and twelve months' hard labour for forgery and false pretences, at the Central Criminal Court on the 6th of September, 1910. Leave to appeal and legal aid had been refused by Darling J. Applicant was not present.

THE LORD CHIEF JUSTICE: The effect of the passing of concurrent sentences of penal servitude and hard labour is to prolong the period of hard labour and to reduce the opportunity of the prisoner to earn remission of his sentence by good conduct. Although the Court lays down no general rule, as in many cases it might be quite right to inflict sentences of a different character, there should be a reason for this infliction. Here, perhaps, the effect of the two sentences is greater than was intended. It is probable that the hard labour will be reduced to one day.

Leave to appeal granted.

W. B.

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Edward Feldman.

EDWARD FELDMAN (*a*).

A misstatement in a summing up of an essential part of the prosecutor's evidence is a ground for quashing a conviction.

A. T. Bucknill for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

The facts were as follows: The prosecutor was a Frenchman who desired to place a patent model engine in London; he advertised for an agent to assist him in doing so, and the advertisement was answered by appellant. They went about London together on this business, and on the 29th July appellant called at the prosecutor's lodgings and a dispute arose as to the payment of appellant's expenses, which prosecutor declined to pay. While appellant was in the room the prosecutor placed his purse, containing £13 10*s*., in his bag. Appellant picked up the bag and went off with it, but was overtaken by the prosecutor. Appellant stated that he took the bag in order to compel the prosecutor to pay him the amount in dispute between them. It was alleged by appellant that they then went into a public-house together, and that while there the prosecutor gave him 12*s*. 6*d*. out of his purse, and that prosecutor took his bag and went out. Whilst walking home, the prosecutor found his empty steel chain purse in the gutter.

At the trial appellant was undefended, and did not go into the witness-box.

Counsel then examined *May Page*, a barmaid at the Swan Inn, Tottenham, who stated that she was in the bar on the morning of the 29th July, when appellant and another gentleman came in. They both had bags in their hands and talked together in a foreign language. She saw money pass from the prosecutor to appellant, which the former took from a steel chain purse which he took out of his pocket. The prosecutor went out first, and appellant stayed behind and called for a drink.

Cross-examined by *J. S. Henderson*, for the Crown, the witness admitted that when questioned shortly after the occurrence she had been unable to remember seeing either prosecutor or appellant in the bar.

(*a*) See p. 190, above.

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Edward Feldman.

A. T. Bucknill urged (1) that appellant was a man of excellent character, a fact which was never before the jury, while in summing up, the learned Chairman, by the use of the phrase that the prosecutor "gets into the hands of this German," suggested to the jury that he was a man of bad character; (2) none of the money alleged to have been stolen was ever traced to him; (3) the case was one of circumstantial evidence. The prosecutor put the purse into the bag, and the next place in which he saw it was in the gutter. But the learned Chairman stated to the jury that the evidence was that the prosecutor had actually seen appellant take the money out of the purse and throw the purse in the gutter. This the prosecutor never said. (4) That the jury should not have been told that if they believed the prosecutor there was an end of the case, as a third view was possible, viz., that some third party might have taken the purse out of the bag.

J. S. Henderson, for the Crown, submitted that the case was purely one for the jury.

The Lord Chief Justice: It is important that the summing up should represent fairly the evidence. Verdicts given after inaccurate statements of the evidence require to be seriously considered. [The learned judge here read from the shorthand notes the summary of prosecutor's evidence interjected by the Chairman during appellant's cross-examination of the prosecutor.] We can find nothing in the evidence of the prosecutor that amounts to a substantial support of that summary. A verdict which proceeded upon that summing up and such a version of the evidence as we have mentioned, is one which cannot stand. The learned Chairman *may* have misled the jury. The conviction must be quashed.

Conviction quashed.

W. B.

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John Mallon.

JOHN MALLON.

Hard labour cannot be inflicted for a common law offence.

This was an appeal against conviction on a point of law, and also by leave of Darling J., against sentence.

Appellant was convicted at the Liverpool City Sessions on August 14th, 1910, together with a man named Cawley of conspiracy to incite to commit crime, and was sentenced to two years' hard labour. The facts sufficiently appear from the judgment of the Court.

A. Hildesheimer for the appellant (under s. 10 of the Criminal Appeal Act) who was not present, stated that no useful purpose could be served in arguing any of the grounds given in the notice of appeal, and addressed the Court only on the question of the sentence. Mallon was a police spy. The jury, thinking that Cawley was under Mallon's influence, had recommended the former to mercy, but there was no evidence of the view the jury took. If the learned Recorder was influenced in passing sentence by something of which there was no evidence, it is a case for remission. There was no evidence upon which the jury could found the inference that Mallon's was the master-mind, and the Recorder was wrong in giving effect to their recommendation.

J. H. Layton, for the Crown, who stated that the learned Recorder was now of opinion that he had no power to pass such a sentence, was not called upon.

Lord Coleridge J.: In this case the prisoner was convicted of a common law conspiracy. It is conceded that a sentence of two years' imprisonment with hard labour is not a sentence which in law could be passed for such an offence. The case is a very grave one. Mallon and Cawley made up their minds to incite one Rigby to commit an offence when he came out of prison for the purpose of getting a police reward. Rigby consented to commit the offence, but became suspicious and gave information to the police. Mallon also informed the police that Rigby was about to attempt to commit this offence, his object

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John Mallon.

being to obtain the reward. The jury were entitled to apportion the blame between the two defendants by taking into consideration their demeanour at the trial and founding a conclusion upon it. The sentence was a proper one, but the hard labour must be altered to simple imprisonment.

Sentence of hard labour remitted.

Solicitor for the Crown—*The Town Clerk of Liverpool.*

W. B.

WILLIAM SIMPSON.

William Simpson.

Inadequacy of sentence—Sentence increased.

Where the defendant deliberately refuses to raise the defence of insanity at the trial, the Court will not allow him to raise it on appeal.

Appellant, who had been convicted on September 10th, 1910, at the Central Criminal Court, of shooting with intent to murder, appealed, by leave of Darling J., against a sentence of twelve years' penal servitude passed by Hamilton J. The facts sufficiently appear from the judgment.

Appellant, who appeared in person, was asked by the Court whether he was aware that the Court had power to increase his sentence, and replied in the affirmative. He urged that the fact that he had at one time been confined in a lunatic asylum ought to have been considered by the learned judge in passing sentence.

Travers Humphreys, for the Crown, was only called on as to the inadequacy of the sentence.

It would be difficult to imagine a worse case of attempted murder. The motive of the appellant was robbery, and he was equipped, in addition to a revolver, with chloroform and ropes. He fired five shots at Mr. Frost at close range. Two cartridges missed fire, and only one bullet hit Mr. Frost, but that one went through his chin, and was fired at a distance of not more than twelve inches. For such a crime twelve years' penal servitude is not sufficient punishment.

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William Simpson.

The Lord Chief Justice: In this case appellant appeals against a sentence of twelve years' penal servitude passed by Hamilton J. on a conviction for shooting with intent to murder. Leave to appeal was granted by Darling J. on the ground of the insufficiency of that sentence. We pointed out to appellant that his sentence might be increased if he persisted in his appeal, and he said he was aware of that fact. The defence of insanity was not raised at the trial, the appellant deliberately desiring not to raise it. The attempt to murder in this case was as deliberate and as well planned as any that has been before the Court, at any rate in my experience. The appellant bought a revolver and cartridges, and as the cartridges did not fit he sent them back and obtained others. He selected an afternoon train which did not stop at several stations, and which passed through a long tunnel. Chloroform was afterwards found upon him. On getting into the train he held a newspaper in front of him, behind which he appeared to be reading. He pulled the trigger four times; on the first and second occasions the revolver missed fire, the third and fourth shots passed close to Mr. Frost, and the fifth hit him on the jaw. The crime was attempted in a railway train passing through a tunnel, when a shout for help might not have been heard. Attempts of this kind must necessarily be most dangerous to persons travelling alone, and, as Hamilton J. has said, but for the courageous conduct of the prosecutor, death might have been the result.

The Court is of opinion that the sentence of twelve years' penal servitude was insufficient, and that fifteen years' would be a proper term. If the appellant is suffering from insanity he will be carefully watched and carefully treated, but that is no ground for inflicting a less punishment when it is quite clear that the crime was premeditated. The sentence of the Court is fifteen years' penal servitude, to date from the conviction.

Sentence increased.

W. B.

JAMES MORAN.

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James Moran.

On the trial of an allegation of being a habitual criminal no evidence may be given of "other grounds," except those specified in the notice under s. 10 of the Prevention of Crime Act, 1908.

In this case appellant pleaded guilty at the Shrewsbury Sessions on October 19th, 1909, to receiving stolen property, and was also found guilty of being a habitual criminal, and was sentenced to three years' penal servitude and ten years' preventive detention. He appealed, by leave of Darling J., against his conviction as a habitual criminal.

Harold Hardy for the appellant (under s. 10 of the Criminal Appeal Act), who was present. (1) The sentence was excessive, the ten years' preventive detention being the maximum allowed by the Act, and (2) the conviction ought to be quashed, because the notice served upon the prisoner was not in accordance with the requirements of s. 10 of the Prevention of Crime Act, 1908. Appellant was undefended at the trial, and had drawn up the grounds of appeal without any legal assistance. The point as to the notice being insufficient was not specifically stated in legal phraseology, but it was submitted that the grounds of appeal alleged the grievance which the provisions of the Act as to notice were intended to prevent. The appellant complained, in effect, that he was taken by surprise at the trial, because a detective was called, who stated that appellant was an associate of thieves, and never did any work. He gave the names and addresses of a number of employers in the building trade for whom he had worked, and some of these might have been called for the defence, if the notice had not been misleading. The notice in effect said that the prosecution relied upon the three statutory convictions as establishing that the appellant was persistently leading a dishonest and criminal life. Appellant could not dispute the convictions, and therefore would be led to suppose that no evidence would be of any use. The notice ought to contain all the grounds upon which the prosecution relied. Counsel referred to *Turner*, (1910) 1 K. B. 346; 74 J. P. 81; 26 T. L. R. 112; 3 Cr. App. R. 103; and *Waller* (1910) 1 K. B. 364; 74 J. P. 87; 26

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T. L. R. 142; 3 Cr. App. R. 213. The object of the notice was to give the accused time and opportunity to prepare his defence. The notice was insufficient for this purpose because it did not state all the grounds, but omitted certain allegations which appellant had no opportunity to rebut. The evidence of the detective undoubtedly would operate on the minds of the jury, and they ought to have been directed to disregard it. There was nothing to shew that any direction had been given to the jury, and their verdict was based upon other grounds than those which were stated in the notice.

Langley, for the Crown. I was present at the trial, and what happened was this. The learned Deputy-Chairman, having in his mind a then recent decision of this Court, put a question to Detective-Constable Winter, who was called by the prosecution to prove one of the three statutory convictions. That question was directed to the manner in which the appellant had spent the period of eleven months following his last imprisonment and preceding the commission of the offence to which he had then pleaded guilty. Even admitting that the answer that "prisoner is an associate of thieves" was not strictly admissible, notice not having been given to the prisoner of such evidence of "other grounds," I submit that the Court should not therefore give effect to this appeal. *Ernest Marshall*, 5 Cr. App. R. 25; 74 J. P. 381 (1910): "The Court will not give effect to a merely technical objection to the statutory notice of 'other grounds' unless it is formally raised in the notice of appeal." Here it is not raised formally in the prisoner's notice of appeal. *Edwin Jones*, 5 Cr. App. R. 29 (1910): "The Court will not give effect to a merely technical objection to the statutory notice, if there has been no miscarriage of justice." Here there has been no miscarriage of justice.

[Lord Coleridge J.: Suppose appellant has as a fact been trying to get work during the eleven months, as he says. How can you say there has been no miscarriage of justice?]

It is necessary for appellant to shew that, apart from that answer, the jury had no sufficient grounds for holding that he "is leading a persistently dishonest and criminal life." Having

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—
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regard to the thirteen further previous convictions on indictment, and nineteen summary convictions for drunkenness, &c. (notice of the proof of which was duly given to the appellant), I submit that that cannot be said.

The general effect of the decisions of this Court (see *Turner*, above; *Kelly*, 26 T. L. R. 196; 3 Cr. App. R. 248 (1909); *Fawcett*, 5 Cr. App. R. 115 (1910)) is that evidence of the prisoner's behaviour between his last conviction and the commission of the offence being tried is not essential, but is often a matter of importance. I submit that here, having regard to his record, such evidence was not necessary. The position is the same as if the presiding judge had asked a witness for the prosecution some question which elicited an answer not contained in the depositions. That frequently happens, and is not sufficient cause for upsetting the verdict of the jury.

[PICKFORD J.: But suppose that question results in evidence being given which is not admissible? Did the presiding judge call attention to that answer in his summing up?]

There is no note of the summing up, and at this distance of time I cannot remember. In conclusion, I submit that appellant, by his notice of appeal, throws himself on the mercy of this Court and invites a reconsideration of the facts. He says he can call witnesses to prove that he has been working all his life, but in answer to the question (in his notice of appeal), "Do you desire to apply for leave to call any witnesses on your appeal?" his answer is "No."

[The LORD CHIEF JUSTICE: Appellant drew his own notice of appeal. Besides, it is too much to expect of him that he should bring these witnesses, whose names and addresses he gives, all the way from Manchester.]

The Director of Public Prosecutions has been in communication with the police authorities at Manchester, and Detective-Constable Winter who gave evidence at the trial, and others are here, if the Court desires to hear them.

The LORD CHIEF JUSTICE: In this case the appellant, having

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been sentenced to penal servitude for receiving, was sentenced to ten years' preventive detention because the Chairman (as he has informed us) thought that a long term of preventive detention would be good for the appellant, and did not interfere altogether with a man's liberty. A sentence for so long a term as ten years is not desirable except for very grave offences. The difficulty is that the statutory notice, which was referred to in *Turner* and other cases, did not refer to anything but a series of previous convictions from 1868 to 1908, the three statutory ones and others, and did not specify the "other grounds." There is no shorthand note, but it appears that a detective was called to prove one of the convictions, and he said that the prisoner was an associate of the worst class of thieves, that he lived by thieving, and that he had done no honest work for ten years. These were "other grounds." If that evidence was given as an affirmative ground for asking for a verdict, it was not admissible in view of the notice. We do not know how it came to be given, but it is better to err on the side of not doing a man an injustice than to insist on that part of the sentence which may have been induced by this evidence. In our opinion this evidence ought not to have been given without proper notice, and in these peculiar circumstances the sentence of ten years' preventive detention will be quashed. The sentence of penal servitude must stand.

Conviction as habitual criminal quashed.

W. B.

John Yates.

JOHN YATES.

In considering the sentence upon a habitual criminal, regard must be had to the nature of the crime for which he last served a term of imprisonment.

This was an appeal against sentence, and from an order of Darling J. refusing leave to appeal against convictions for housebreaking and as a habitual criminal.

Appellant was convicted, on August 9th, 1910, at Kingston

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Quarter Sessions, of housebreaking, and sentenced to three years' penal servitude and five years' preventive detention.

Appellant, in person, handed in a written statement.

R. E. Otter, for the Crown, was called upon to support the conviction under the Prevention of Crime Act, 1908.

There was sufficient evidence upon which the jury might convict the prisoner as a habitual criminal, and the case was properly left to them by the Chairman.

Appellant was convicted in 1901 and 1904, and also June, 1906, when he was sentenced to three years' penal servitude. In February, 1909, he was again convicted and sentenced to nine months' imprisonment under the Prevention of Crimes Act, 1871. After serving this sentence and a *remanet* from his previous sentence, he came out of prison on 7th May, 1910, and he was arrested on July 2nd, 1910, on the charge of housebreaking, for which he was convicted.

There was very little evidence of what the prisoner had been doing between 7th May and 2nd July. It was admitted that he had applied to the Church Army for work, and had done two isolated jobs. Appellant stated that he had made other applications for work, and had hawked plants about the streets. The evidence of the police was that he had done no honest work, and they regarded him with suspicion because he was in the habit of hanging about houses with a sack and barrow; on the occasion of this offence he had the sack but not the barrow. It is submitted that one or two isolated attempts to get work are not sufficient to establish honesty of life. This is a stronger case than *Jennings*, 26 T. L. R. 339; 74 J. P. 245; 4 Cr. App. R. 120 (1910); see also *Martin*, 5 Cr. App. R. 31 (1910).

[Pickford J.: Do you know any of the circumstances relating to the offence for which he was convicted in 1909?]

He was convicted of loitering in suspicious circumstances, but the circumstances do not appear from the shorthand note. [The Court adjourned the case in order that information might be obtained on the point.]

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The evidence of the detective-officer in charge of the 1909 proceedings being taken, it appeared that appellant had been seen loitering round two houses, and one of them was afterwards found to have been broken into. He was first charged with housebreaking, but no evidence was offered against him; he was then charged and convicted of being a suspected person found loitering.

The Lord Chief Justice: In this case appellant has appealed from an order of Darling J. refusing him leave to appeal against convictions for housebreaking and as a habitual criminal. He has disclosed no ground for interfering with his conviction for housebreaking, but his conviction as a habitual criminal is more difficult to deal with. There is no complaint made as to the sufficiency of the notice given to the prisoner under s. 10, subs. 4 (b) of the Prevention of Crime Act, 1908. The evidence of the prosecution was that appellant had not tried to do honest work, but had gone about with a sack and a barrow. He asserted he had done one day's work for the Kingston Corporation, and he had also applied to the Church Army for work. There was an interval of two months between his release and his last arrest, but there was not much evidence tendered as to this period. We desired information as to his conviction in 1909 for loitering, and we were told that he had been found loitering about houses. So within two months of coming out of prison he was doing the same thing again. The Chairman summed up the case fairly, and in all the circumstances we think the conviction should stand.

Appeal dismissed.

W. B.

JOSEPH ALLEN, SARAH ALLEN, BARBARA WINTER.

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Cases referred to this Court by the Home Secretary are heard exactly as if they were appeals.

Case referred by the Home Secretary.

Prisoners were convicted before Channell J. at the Chester Assizes on July 12th, 1910, of robbery with violence, and were sentenced to nine, six, and four months' imprisonment with hard labour respectively. There was no appeal by the prisoners.

The documents forwarded to the Court by the Home Secretary were copies of letters from the Chief Constable of Birkenhead to the Home Secretary, the reports of a police sergeant and a detective to the Chief Constable, a letter from Mr. Justice Channell to the Home Secretary, and the report of the Governor of Knutsford Gaol on the prisoners' not appealing; the shorthand notes of the trial were also before the Court.

R. M. Montgomery for the prisoners (under s. 10 of the Criminal Appeal Act), who were not present. The conviction ought to be quashed because it is unsatisfactory. The prisoners were gipsies, and prosecutor (Woodward) had gone to their field, as he alleged, to buy a van. Only one witness, David Hugh Williams, really proved a possible intent to rob or any robbery. That witness has now absconded from his lodgings without paying his rent, and is suspected of having taken his landlord's watch. The prosecutor and his wife never asserted that they had seen any robbery or knew how it occurred, for the man said that he had been stunned, and when he came to, his jacket was no longer on, and his money was not in it, and the woman stated that she was rendered unconscious at the time. It is very doubtful whether the prosecutor had such a sum as £42 in his pocket at all. The report of the Chief Constable of Birkenhead shews this. Channell J., in his letter to the Home Secretary, states that "having regard to the report of the Chief Constable, especially as to D. H. Williams, I should before the Criminal Appeal Act have advised the Home Secretary that the conviction was unsatisfactory, but knowing that all prisoners are informed of their right of appeal, their not having appealed seems almost equivalent to an admission of guilt." He read to the Court

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the documents forwarded by the Home Secretary and the summing up of Channell J.

The facts can most conveniently be gathered from the summing up of Channell J., who said: "If the prosecutor really had that £42 in his breast pocket, all the probabilities are in favour of the story for the prosecution that it was stolen by these people who assaulted him, and that it was not a mere row. It is a very odd thing that there and then on the ground, when he had been kicked and knocked about, Woodward (the prosecutor) could have invented straight off this story about the £42. How did Woodward's coat and waistcoat get off? The young man Williams says that he saw them pulled off after the man had got knocked down—that they were pulled off by Allen, and handed to Mrs. Allen, and that she searched the pockets. If that is true, it is fairly conclusive of the whole matter, but except for that the evidence rather is that he took his own coat off. Taking a coat and waistcoat off is one of the indications that you are going to fight, and if both Allen and Woodward did that, it would seem to indicate that they were going to have it out. If you think that Williams is entirely independent, and a person you can trust, he just proves the case against the prisoners."

A. J. Laurie, for the Crown, pointed out that the evidence of another witness was that he saw one of the prisoners putting his hand near the trousers pocket of the prosecutor—the money was alleged to have been in a coat pocket.

The Lord Chief Justice: This case was referred to the Court by the Home Secretary under the provisions of s. 19 (a) of the Criminal Appeal Act, 1907; it does not seem to be a case in which this Court can possibly interfere. If the Home Secretary has information which enables him to go behind the evidence, well and good, but sitting as a Court of Appeal, there is no evidence to justify us in quashing this conviction.

The prosecutor and his wife went to the gipsy encampment for the purpose of buying a van, and it was not an occasion on which it can fairly be said that the probability was against these people having the money upon them; there certainly was a fight.

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With regard to the witness Williams, he is corroborated by Mayger, and I can see no reason why Williams should favour one side more than the other. The fact of Williams going away without paying his rent and, perhaps, with his landlord's watch, shews him to be a man not entitled to credit, but I cannot see why he should give evidence in favour of Woodward, the prosecutor, more than for Allen.

Cases of this kind are referred to us as if they were appeals, and cannot be treated upon considerations different from those which are applicable in the case of appeals. The conviction must be upheld.

Convictions affirmed.

W. B.

BEFORE

MR JUSTICE DARLING, MR. JUSTICE PICKFORD AND MR. JUSTICE COLERIDGE.

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Joseph Edwards.

JOSEPH EDWARDS.

Severity of sentence.

This was an appeal against sentence, by leave of Darling J. Appellant was convicted of larceny on September 24th at the Middlesex Sessions and sentenced to two years' imprisonment with hard labour.

The appellant, who was present, was not represented.

R. P. Hughes, for the Crown, was not called upon.

LORD COLERIDGE J.: There were four previous convictions against the appellant, the last three of which were convictions for larceny. In 1907 he was sentenced to six months', in 1908 to nine months', and in 1909 to fifteen months' imprisonment with hard labour. The offences were of a petty nature very similar in character to the present offence. This Court has often pointed out that if very severe sentences are imposed for small crimes, it leaves no heavier sentence for graver crimes, and although it seems the appellant made a practice of stealing articles from shops, we think the sentence of two years' imprisonment with hard labour is too heavy. The sentence will therefore be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. R.

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Bridget Warrillow.

BRIDGET WARRILLOW.

It is undesirable that a first sentence of penal servitude should be for a term of five years.

In the case of habitual drunkards charged with offences, it may be expedient to frame the indictment under 61 & 62 *Vict. c.* 60, *the Inebriates Act*, 1898.

This was an appeal against sentence, by leave of Darling J. She was convicted on September 6th at the Hanley Quarter Sessions of stealing a door-mat of the value of one shilling and sixpence. She had been convicted eighteen times of petty theft between 1884 and 1908, and fifty-seven times of drunkenness. The learned Recorder, in passing sentence, referred to the previous convictions and said that no punishment seemed to prevent prisoner from committing those crimes, and that he did not know what to do with her, but he must protect the public and pass a long sentence upon her, which, even if it failed to bring about reform, would at least keep her out of mischief.

Appellant, who was present, was not represented.

E. A. Whitehouse, for the Crown. My instructions are not to argue in support of the sentence if the Court should be of opinion that the sentence should be altered.

Darling J.: In this case this woman was tried before the Recorder of Hanley for stealing a door-mat; she was convicted and sentenced to four years' penal servitude. He did not impose so long a term because he held any opinion as that stealing door-mats was a very grave offence. The evidence before him was that the woman was a habitual drunkard. She was continually stealing something in order to buy more drink. She has been previously convicted eighteen times for committing petty thefts, and fifty-seven times for being drunk. If the learned Recorder had passed a short sentence he would have done so with the full knowledge that the appellant would get drunk again on coming out of prison. He therefore passed a long sentence because he expressly desired this Court to review his sentence. But the law does not yet provide the appropriate sentence for such a person as appellant. She is a thief because she is a drunkard. She wants such a sentence as will prevent

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her from getting drunk. But we are unable to pass such a sentence as will adequately meet the case. We can only give here the kind of sentence which the Recorder gave her. She will at any rate get a certain amount of work in the open air under the supervision of the prison doctors. She will not be treated as a hardened criminal, but merely as a habitual drunkard, by experts, and she will not have to do laborious work.

But, in accordance with the cases that have come before this Court, it is not desirable that the first sentence of penal servitude should be one of four years. The sentence will therefore be reduced to three years' penal servitude. But we very much regret that the law does not provide us with the appropriate sentence for this kind of crime. Of course, the indictment might have been different. It might have been framed under the Inebriates Act, and then appellant would have been sent to a home for inebriates. But the country is very ill-provided with such homes. Even if the Home Secretary has power to send her to such a place, we have not.

Sentence reduced.

A. R.

ALFRED WALKER.

Alfred Walker.

When there is a charge of being a habitual criminal, it ought to be tried before sentence is passed on the primary charge.

This was an appeal against sentence. Appellant pleaded guilty on October 3rd at the Leeds Sessions to two charges, one of burglary, the other of being a habitual criminal, and sentenced to five years' penal servitude and five years' preventive detention.

Appellant was not present and was not represented. He was defended by counsel at the trial.

T. P. Perks for the Crown. Appellant's last sentence was three years' penal servitude for burglary, and a rather serious one, for he broke into a house in which there were only three

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women. There is a *remanet* of 279 days outstanding on this sentence.

[PICKFORD J.: The five years' penal servitude was passed before the allegation of being a habitual criminal was disposed of.]

That was so. I submit it is in accordance with the practice. It is usually done at these sessions, or, at all events, the learned Recorder usually ascertains first whether the case is one for penal servitude before going on with the charge of being a habitual criminal.

DARLING J.: In this case the appellant pleaded guilty to a burglary, and he had many previous convictions against him. There was a *remanet* of 279 days from his last sentence. The learned Recorder, immediately upon his plea to the burglary, sentenced him to five years' penal servitude. The appellant was then charged with being a habitual criminal. He pleaded guilty to this charge also, and the learned Recorder then had only one duty to perform, which was to sentence appellant to preventive detention.

The intention of the Legislature is that preventive detention shall do good. The longer you delay this method of reform by way of preventive detention the worse it is for the prisoner. In this case the delay would be for five years and 279 days. The proper sentence would have been three years' penal servitude and five years' preventive detention. We must, however, say a word as to the manner in which the sentence was passed, especially as counsel says it is usual in Leeds. He told us that the learned Recorder, even if he does not first pass sentence of penal servitude, at all events ascertains whether the case is one for penal servitude, before placing the appellant on his trial for being a habitual criminal. The proper way to deal with such a case is to be found in the judgment of Channell J. in *Turner*, 3 Cr. App. R. 162. The facts upon which the Crown rely to prove the charge of being a habitual criminal must be inquired into before sentence is passed on the primary charge. We have nothing to add to the rule the Court laid down in that case, and

we only desire to repeat that as it has not been acted upon, we hope that judges will in future do it in the proper manner.

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Sentence reduced.

A. R.

PERCIVAL BRUCE (*a*).

Percival Bruce.

The Court does not favour sentences of concurrent penal servitude and imprisonment with hard labour.

This was an appeal against sentence, on leave granted by the full Court. Appellant was convicted on September 6th at the Central Criminal Court of forgery and false pretences, and sentenced to seven years' penal servitude and twelve months' imprisonment with hard labour, to run concurrently.

The appellant, who was present, was not represented.

E. S. Abinger, for the Crown, was not called upon.

PICKFORD J.: We cannot say here that the consequences of giving a sentence of hard labour concurrently with a sentence of seven years' penal servitude were considered. In these circumstances we shall reduce the sentence of twelve months' imprisonment with hard labour to the nominal sentence of one day.

Sentence reduced.

A. R.

ALFRED ATHERTON.

Alfred Atherton.

Proviso to sect. 4, *sub-sect.* 1 *of the Criminal Appeal Act*, 1907, *applied, despite clear misreception of evidence.*

This was an appeal against conviction on law, and from the order of Ridley J. refusing leave to appeal against conviction on fact. Appellant was convicted on September 30th, 1910, at the Manchester City Sessions, of receiving stolen goods, and sentenced to six months' imprisonment with hard labour.

(*a*) See p. 213, above.

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J. C. Jackson for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. This appeal is brought on account of misdirection and non-direction. Appellant was charged with another man Cassidy, who does not appeal, with breaking and entering the shop of William Valentine, and stealing therefrom twelve vests and seven pairs of boots. They were also charged with receiving. Both were found guilty of receiving only. The case for the appellant was that he had bought the boots at the Flat Iron Market, and the vests of a pawnbroker, named Riley. At the trial George Riley, son of Frederick Riley, was called by the prosecution to prove that the books kept by his father contained no record of any sale to the prisoners, and also to say that the vests did not bear the private mark of Riley upon them. My submission is that there was misdirection on this evidence. George Riley admitted he was not a salesman, and that he kept no books. I objected to the book being put in as evidence because the entries were not in the handwriting of the witness. The learned Recorder, however, addressed the jury as if the evidence were admissible. Further, it was alleged by the prosecution that when arrested the prisoners stated that they bought the vests from a clean-shaven man at Riley's; Riley's son was examined to shew that he was the only clean-shaven man at his father's shop. There was no evidence at all to shew that the prisoners had ever made such a statement. In the summing up, however, the learned Recorder uses the alleged statement against the prisoners. Again, as to the learned Recorder's remarks about the evidence of a woman named Smith, my submission is that as what she said was contradicted by Atherton, it ought not to have been referred to in the summing up. Upon this part of the case the learned Recorder, repeating P.-C. Fingland's evidence, said: "Both said, 'We bought our boots from Levinston's, who is a licensed broker in Red Bank,' and there was a woman (Smith) present. The two prisoners were also there. I said to the woman, 'You have made a statement, will you repeat it in the hearing of the two prisoners?' She said 'Yes,' and said, 'I have had these articles,' pointing to some which were lying on the counter, viz., seven waistcoats and two blouses, the balance of the stolen property, 'I had these articles from these two men to sell,' she said." Atherton replied at once, "She knows nothing at all about it." The

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woman was not called, and therefore I submit the learned Recorder ought never to have referred to this conversation. The statement of Atherton that he had bought the boots from Levinston was never contradicted. There was no evidence of his ever having said he had bought of a Mr. Ash; therefore the learned Recorder ought not to have referred to Ash Brothers at all.

In view of what this Court said in *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 5 Cr. App. R. 65, as to statements of witnesses, not called, I submit that the appellant ought to succeed.

[Pickford J.: Goods are stolen on the 14th of the month at the Flat Iron Market. The prisoner is found wearing a pair of the stolen boots on the 15th. Is that not evidence against him? Suppose he says, "I bought them at Levinston's," but does not call Levinston. Would not the jury be entitled to say that that was evidence against him?]

But appellant gave information saying where he had bought, and the police do not at the trial bring any evidence to disprove his statement.

It is true there may be some evidence that the vests did not come from Riley's; but this notwithstanding, there were the misdirections I have already indicated. I especially draw attention to that on the statement of the woman Smith. The learned Recorder misdirected the jury in using her evidence at all.

[Lord Coleridge J.: Not so; but in saying that they might rely upon her statement as evidence of the truth of the facts contained in the statement.]

I agree. Then your lordships must be satisfied that if the jury had ignored the woman's statement the jury would, not *might*, have come to the same conclusion. See *Stoddart's* case, referred to in *Norton's* case, 5 Cr. App. R. at p. 76. I submit the statement ought never to have been allowed to be given in evidence.

[Lord Coleridge J.: You say that if admitted *per incuriam*, the

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learned Recorder ought to have told the jury it was no evidence of the truth of the facts contained in it.]

Yes.

A. J. Lawrie, for the Crown. There is no doubt the rule as laid down in *Norton* was transgressed in allowing evidence of the statement made by Smith to the police-constable. In the judgment of the Court in that case Pickford J. said: "The principle on which the Court acts in such cases is laid down in *R.* v. *Stoddart*, *i.e.* in order to support the conviction we must come to the conclusion that if the jury had obeyed the direction and disregarded the girl's statement, they would—not might—have come to the same conclusion." I submit the evidence is sufficiently clear, apart from the statement of the woman Smith, for your lordships to say the jury would have come to the same conclusion.

[Lord Coleridge J.: The jury were not warned.]

That is why I must shew that the result would have been the same. I submit the evidence was enough to warrant a conviction. Appellant was found in possession of goods recently stolen; it was for him to account for that possession. All he answered when charged was, "I have nothing to say." Again, appellant, when on his way to the police station, said to the detective, "I suppose she has shopped me; it served us right for trusting her; she shopped her own husband." "Shopped" is a slang term among thieves, and here it amounts to an admission of guilt, because in effect appellant complains that the woman gave him away. Lastly, I submit it was appellant's duty, not that of the prosecution, to prove where he had bought the boots, and he called no evidence on that point, and gave none himself.

Darling J.: The Court has had a great deal of difficulty in coming to the conclusion that this conviction should be upheld. There were several faults in the summing up of the learned Recorder. Having regarded to what was decided in *Norton*, Mr. Lawrie is not in a position to defend those faults. It is impossible to shut our eyes to the fact that

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here and there things were stated to have been proved which were not proved at all. We must see whether, supposing these things, which ought not to have been left to the jury, had been omitted, the jury would have come to the same conclusion. We think they would.

A number of things were stolen. Appellant was actually wearing one of the stolen waistcoats bearing upon it a private mark. He could give no explanation as to how he came by it. If this were all, the jury would have convicted him, but he had an opportunity of going into the box and furnishing an explanation. He could then have made the holes in the evidence of the prosecution very much larger.

We have come to the conclusion that the jury would have come to the same verdict even if the case had been tried in the proper manner in other respects.

Appeal dismissed.

A. R.

SAMUEL HAWKINS.

Samuel Hawkins.

Severity of sentence.

This was an appeal against sentence, by leave of Ridley J. Appellant was convicted on October 8th at the Liverpool City Sessions of housebreaking, and sentenced to eighteen months' imprisonment with hard labour.

Appellant, who was present, was not represented.

Madden, for the Crown, was not called upon.

DARLING J.: In this case the appellant was convicted of breaking into a house, and sentenced to eighteen months' imprisonment with hard labour. There were nine previous convictions against him, but no really serious offence committed since 1903, in which year he was convicted of housebreaking, and sentenced to six months' imprisonment with hard labour.

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In these circumstances we think the sentence was too severe, and should be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. R.

William Henry Ball and Edith Lilian Ball.

WILLIAM HENRY BALL AND EDITH LILIAN BALL.

For a trial for incest, evidence of offences similar to those alleged in the indictment, and not on the dates therein alleged, is inadmissible: Allen (4 *Cr. App. R.* 181; 1910) *not followed.*

This Court has no power to hold to bail, or to do otherwise than release an appellant whose conviction has been quashed (quoad *that conviction*).

This was an appeal on certificate against conviction. Appellants were convicted on 14th October, before Scrutton J., at the Central Criminal Court, of incest. The male prisoner was sentenced to three years' penal servitude, and the female prisoner to six months' imprisonment in Division II.

Forrest Fulton for the appellants (under s. 10 of the Criminal Appeal Act), who were present. These two appellants, brother and sister, were tried under 8 Edw. 7, c. 45, the Punishment of Incest Act of 1908. The male prisoner was for twenty-four years in the army, and bore an excellent character.

This conviction ought to be set aside upon the ground that evidence was wrongly admitted, and on account of irregularities in the summing up.

The male prisoner is 42 years of age, the female 24. In October, 1909, the man became tenant of a house at Walthamstow, and the woman lived with him up to the date of the arrest, on September 20th Observation was kept upon the premises during the month of July, with the result that it was ascertained that appellants were living there with a small child. Certain other things took place on the 12th July. These were the material dates in the indictment. It was alleged that on 12th July they met at Hoe Street, entered the house

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together, and that subsequently a light appeared in the bedroom window. Conversation was heard between people who were obviously a man and a woman. On September 20th the police effected an entrance at 11.15. They were met by the male prisoner, and the woman was found in the bedroom on the first floor; the room was apparently occupied by two persons and a child. They were then taken into custody.

A letter was found written by the man relating to the child. The suggestion of the prosecution was that the tone of the letter went to shew they were living together as man and wife. If the case had been left here I should have submitted there was no case at all. I venture to suggest that where actual carnal knowledge is laid, then actual penetration must be proved. But the case did not stop there. The prosecution put in evidence that they were living together as husband and wife in 1907 and 1908. I ask that the conviction be quashed by reason of the inadmissibility of this evidence. The woman, shortly after the man went to Walthamstow in 1907, joined him there. In March, 1908, the child was born. They continued to reside there together till 1909. The female prisoner registered the male prisoner as father of the child. There is no evidence that the male prisoner ever saw the register. As against the man, that is not evidence at all. As against the woman, the register may be evidence, if admissible. In May, 1909, the man took the woman and the child to the house he was occupying with his wife. The wife left shortly after the woman came. I objected to the whole of that evidence upon the ground that what took place in 1907, 1908 and 1909 as shewing that certain other acts might have been done by them, could not be adduced in evidence to prove what was alleged in 1910. It is perfectly well known that you can only give evidence of other similar acts to shew intent or design, or to rebut any suggestion of accident. This, of course, is a different case altogether. The mere fact that the prisoners were living together in 1907, and the fact that the woman registered a child in her own and the other appellant's name, cannot be evidence for the jury on the present specific charges. It cannot be relevant to the issue to shew that something took place in 1907 with the object of getting the jury to infer that the prisoners were the sort of people to do something in 1910.

Allen, 4 Crim. App. R. 181, seems to be against me; but

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the headnote appears not to be borne out by the judgment.* *Chitson*, (1909) 2 K. B. 945; 79 L. J. K. B. 10; 102 L. T. 224; 73 J. P. 491; 25 T. L. R. 818; 2 Cr. App. R. 325, was relied upon by the prosecution. But there is no question of corroboration here, as there was there.

[*Graham-Campbell*, for the Crown: I merely cited the case because my friend said that the exceptions only went to evidence to rebut accident and to shew intent.]

Makin v. *Att.-Gen. of New South Wales*, (1894) A. C. 57, was largely relied upon, especially the judgment of Lord Herschell C. at p. 65.

[Lord Coleridge J.: Is not that case reducible to this: that the other acts were evidence of *mens rea*, and shewed that the prisoners received the child with the intention of making away with it?]

[Pickford J.: There was in that case no evidence of the prisoners having killed the child except the fact of their having buried other children. That is the reason why the learned judge relied on it so much. Lord Herschell says, at p. 65, that evidence of other crimes may be relevant in certain cases "or to rebut a defence which would otherwise be open to the accused."]

The interpretation of that ruling by counsel for the Crown went farther than the Chancellor's statement, viz., that against any defence you may set up other offences; appellant's defence is that they are not guilty of the specific acts indicted. It is not competent for the prosecution to bring forward these other acts merely because appellants deny the acts charged against them; here there is no question of intent.

I say there is *no* issue upon which that evidence could be relevant. The whole question was: Was there carnal knowledge upon the specified dates? There is no question of intent. In *Bond* (above, p. 45), Mr. Justice Darling puts my contention exactly in his judgment.

* *Sed quære.*

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[DARLING J.: Scrutton J. refers to a case in which he says a judge in the Divorce Court said you might always presume intercourse from the fact of a man and a woman being in bed together, unless, indeed, they were husband and wife. I think that observation was originally made by Maule J., and it was not a cynical one as Scrutton J. seems to have thought, but merely one founded on probability. If the facts are that these two appellants lived together for any length of time and slept together on that particular night with the child, what evidence can that be of the specific charge laid in the indictment?]

I submit it is no evidence at all.

There are three heads in *Bond*, under which such evidence would be admissible: to negative accident or mistake; to shew a systematic course of conduct; and to shew guilty knowledge. None of these heads can be reconciled with the facts in the present case. Of course if it is necessary that some one should actually see them in the act, this offence could never be proved. That, however, is immaterial, if the point of law submitted is good.

I object also to the summing up. The learned judge is not entitled to say that because the prisoners did not go into the box and deny certain things, that the jury were therefore justified in saying they were guilty.

Lastly, I object to the amendment of the indictment. The dates laid were 12th July and 30th September. No application was made to amend before the jury were sworn, or before plea, and I had been for some time addressing the jury when Scrutton J. interposed and suggested that the indictment should be amended in order to include in the first count some date unknown between July 1st and 14th. That was after the case was over, and after I had begun to address the jury on the dates laid. I think such amendment very embarrassing; it includes thirteen other possible days for the offence. [LORD COLERIDGE J.: It was not embarrassing in this case, though it might be in another.] My principal contention, however, is that the evidence was totally inadmissible.

Graham-Campbell, for the Crown. Cases relating to acci-

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dent, mistake, and *mens rea* do not really bear on this case. As a preliminary I would remind the Court that Wills J., in *Mean*, 21 T. L. R. 172; 69 J. P. 27 (1904); C. C. R., said that the laws of evidence were the same in civil and criminal cases.

Even if the evidence here objected to had involved an imputation of general bad character or of other criminal offences it would be admissible if really relevant. *Fisher*, (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176. I am not suggesting, however, that these cases of false pretences have any other bearing on this case. As a question of principle, and in the absence of direct English authority, I refer your lordships to *The People* v. *Jenness*, 5 Michig. Rep. 305 (1858), a case of incest where other acts of sexual intercourse and of familiarity for five years preceding were expressly admitted. The evidence in the present case was admissible as going to shew what the relationship between the parties was at the times alleged in the indictment.

[DARLING J.: Suppose it was said that they were living together as husband and wife. Would you then say there was evidence that they had had connection?]

It was open to the jury on the evidence to find that between the 1st and 12th of July and in September of 1910 there was carnal intercourse.

[DARLING J.: The evidence only is that they actually occupied the same bed together with the child on the days alleged in the indictment. What evidence is that?]

In this case where both participants are charged, it is almost impossible to get direct evidence. I do not, of course, say that that makes the evidence admissible. On September 20th there was only one bed with bedding in the house.

[DARLING J.: That is not evidence he did not sleep on a sofa below on that night.]

[LORD COLERIDGE J.: You say the evidence is admissible as

shewing "relationship." What do you mean by "relationship"? Suppose two men were charged with stealing, and it were shewn that they had stolen something in concert on a former occasion. What question of "relationship" as distinct from the question of stealing arises? Surely you mean here, not "relationship," but "an act of intercourse."]

That is not this case. Here the previous acts guide the jury as to the relationship, whether it was that of brother and sister or husband and wife.

[Lord Coleridge J.: You indict for specific acts, not for a relation. You cannot give evidence of former and similar acts to shew that it is more likely that the appellants committed the act of intercourse charged.]

Bearing in mind what Wills J. said in *Mean*, I refer the Court to the English cases. *The Duke of Norfolk* v. *John Germaine*, 12 Howell's St. Trials, 945 (1692), is an authority for saying that you may take into consideration acts outside the years mentioned in the pleadings: *per* Holt C. J.

[Lord Coleridge J.: But in *Harrison*—a trial for murder—in the same volume, at 864, Holt C. J. said the reverse: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be, that is nothing to the matter."]

In *Duke of Norfolk* v. *Germaine*, which was an action of *crim. con.*, the evidence of what took place outside the six years during which adulterous intercourse was alleged to have been carried on, was adduced to prove the very fact it is sought to prove in the present case.

[Pickford J.: Are there any English cases to shew a difference between the evidence admissible in sexual and that admissible in other cases?]

In the United States they say expressly there is. In this country incest has only become a crime since the Punishment of Incest

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Act, 1908. Therefore I go to analogous cases on the question of principle, and I must refer to cases in the Divorce Court and under the Criminal Law Amendment Act. During the argument in *Allen* (above, p. 239), Lawrance J. said: "What do you say to the practice under the Criminal Law Amendment Act—are not like Acts there proved?"

In *Boddy* v. *Boddy and Grover*, 30 L. J. Matr. 23 (1860), evidence of acts of familiarity before the date of the petition having been given, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, was held admissible to shew the character and quality of the acts of familiarity. The same principle was applied in *Wales* v. *Wales*, (1900) P. 63; 69 L. J. P. 34, and in *Thayer* v. *Thayer*, 101 Mass. 111 (1869).

[Lord Coleridge J.: Does not *Boddy's* case shew that if the parties did an act at an earlier time it is more likely they did it at a later time? Can you say that that principle is applicable to the criminal law in face of the judgment of Channell J. in *Fisher* (above)? Apply the principle to a criminal case—say larceny. Suppose an indictment preferred against A. for going to a coal cellar on January 1st and stealing coal. Could you give evidence that A. went to the coal cellar on February 1st, March 1st, and April 1st to steal coal?]

If it was from the same cellar in exactly the same way it might shew system.

[Lord Coleridge J.: What system? Apart from *mens rea* this evidence seems inadmissible.]

Wills J., in *Mean* (above), said that the laws of evidence were the same in civil and criminal cases. I submit the principle is applicable to criminal cases. The facts proved were facts necessary "to explain" relevant facts. [Stephen's Digest of Evidence, Article IX.] Further, "The prior or subsequent existence of a sexual passion in A. for B. is relevant on the same principle and to the same extent [as in the foregoing topics] to shew its existence at the time in issue. The circum-

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stance that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case, nor affect the admissibility of the evidence." (Wigmore on Evidence, Vol. I. § 398.) After which passage the learned author goes on to state that the precedents include three groups, in the first of which we find cases involving incest. This class of evidence has been habitually received in America. See the cases cited in Wigmore, Vol. I. § 398, notes, *e.g.*, *State* v. *Bridgman*, 49 Vermont, 202.

[Lord Coleridge J.: Do you draw any distinction between an adulterous and a criminal disposition?]

No, if by criminal you mean incestuous. Yes, if you are using criminal in the broad sense. On the question of "relationship," it may be said that since the prosecution has plenty of evidence that appellants were living together as husband and wife, there is nothing to rebut; but the appellant is expressly setting this relationship up as an innocent one.

Apart from this, there is a great difference between this case and cases of two isolated acts or transactions separated by a clear interval of time. In *Allen* (above, p. 239), Bray J. said: "Indecent assault does not follow indecent assault, but the inference that might be drawn from continuous living together is another thing." In the present case I submit the acts were in reality continuous. *Rearden*, 4 Foster & Finlason, 76 (1864).

[Pickford J.: Was not the evidence in *Rearden's* case admitted to prove want of consent?]

No, on the ground that the various acts proved were virtually all part of one and the same transaction. (Archbold, 24th ed. p. 366.) There is in this case a continuous living together from 1907 onwards.

C. a. v.

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Darling J. read the following judgment:—

William Henry Ball and Edith Lilian Ball were tried on October 14th, 1910, before Scrutton J. at the Central Criminal Court on an indictment charging W. H. Ball with having had

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carnal knowledge of E. L. Ball, and E. L. Ball with permitting him to have carnal knowledge of her, they being at that time to their knowledge brother and sister. The offence was charged as having been committed

(1) On a day between July 1st and July 14th, 1910;

(2) On September 20th, 1910.

The question therefore was, not whether the defendants were living together generally in the relationship of husband and wife, but whether they, in fact, had carnal knowledge of one another on the particular days charged.

Evidence was given to shew that the two prisoners lived together during the period mentioned in the first count, and also on the day mentioned in the second count, with a female child, in a house containing only one furnished bedroom, and that they slept together in the same bed.

The two prisoners were brother and sister. Evidence was tendered against both prisoners to shew that in November, 1907, the male prisoner brought the female prisoner to a house at Walthamstow, that they occupied the same bed there, and that the male prisoner called the female prisoner his wife, and that in March, 1908, the female prisoner was confined of a female child.

Evidence also was tendered as against the female prisoner to shew that she registered the birth of the child, giving her own name as that of the mother, and the name of the male prisoner as that of the father.

This evidence was admitted. The question is whether the evidence was rightly admitted, and in order that the decision of this Court might be taken, Scrutton J., who presided at the trial, gave leave to appeal.

The Punishment of Incest Act, 1908, 8 Edw. 7. c. 45, under which these proceedings were taken, came into operation January 1st, 1909. The principle of the law is clear. The difficulty lies in its application. Was this evidence, or was it not relevant to the proof of the offence charged? The fact that incest was not a crime in 1907 and 1908 does not affect the relevancy of the evidence. If it was relevant it was admissible whether or not it involved proof of a former offence.

It is a clear principle of law that you cannot give evidence of former offences or acts committed by the accused in order merely

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to shew that the accused is likely to have committed the offence or act charged in the indictment. On the other hand, you may give such evidence in order to shew intent, guilty knowledge, design, system, or to rebut the defence of accident, mistake, or reasonable or honest motive and the like. Or where several transactions are so connected as to form one transaction, the others may be proved in order to shew the character of the transaction impeached. The doctrine has been clearly and briefly defined by Bray J., in *R.* v. *Bond*, (1906) 2 K. B. p. 414, where he says:

"A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads:

(1) Where the prosecution seeks to prove a system or course of conduct;

(2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake;

(3) Where the prosecution seeks to prove knowledge by the prisoner of some fact."

We think the law may be thus briefly summarised. Evidence that the same act was committed before is not evidence of the commission of the act on the day charged.

Such evidence can only be receivable to shew the *mens rea* in the doing of such act.

If on the facts of this case an act of intercourse was proved, no question could arise as to the *mens rea* with which the act was done, for the statute forbids the act as in itself criminal. If, with the admission of the disputed evidence, the fact of the two accused persons occupying the same bed on the date or dates charged was insufficient proof that intercourse took place between them on those dates, then the fact that intercourse took place between them on former occasions could only be tendered to shew that they were persons likely to have intercourse on the particular dates—a ground on which evidence is not receivable. It would be tendering evidence of the former commission of similar acts, not to shew the *mens rea* with which the act was committed, but to shew the commission of the act itself. We are of opinion that such evidence is not receivable.

The learned judge admitted this evidence on the ground that it went to explain the relationship in which the accused persons were found; but, as we have already pointed out, the question

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for the jury was not what was their relationship—*e.g.*, that of husband and wife—but did they have carnal knowledge of one another on the days charged, and it is not admissible to attempt to prove this crime by shewing that it is likely, because the accused had committed a similar one some two years before. Moreover, the mere prolongation of the relationship renders the offence on any given day even less likely.

We think, therefore, that this evidence could not have been admitted in the first instance, and we are of opinion that at the time when it was admitted nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal.

The appeal must therefore be allowed.

Convictions quashed.

A. R.

After judgment had been delivered, *Graham-Campbell* asked leave to address the Court on a matter arising out of the case. He had not proceeded far in his remarks when the Court desired the attendance of the Lord Chief Justice, who accordingly took his seat.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE PICKFORD.

Graham-Campbell (*a*): My Lord, I was drawing the attention of the Court to a point of some difficulty which arises under the Criminal Appeal Act of 1907. Your Lordships know that in s. 1, sub-s. (6), the Act provides: If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision

(*a*) This report is substantially a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords." Then the section concludes: "but subject thereto"—that is, subject to any appeal to the House of Lords—"the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court."

Now, my Lords, the difficulty which arises is that until the decision of the Court of Criminal Appeal has been given, it is impossible for the Director of Public Prosecutions to form or to express any opinion whether the decision of the Court of Criminal Appeal "involves a point of law of exceptional public importance" which would justify him in applying to the Attorney-General for a certificate which would enable him to appeal to the House of Lords if he desired to do so. No rules of procedure have been framed under this Act with regard to the question of appeals to the House of Lords, and, if the Director should desire an opportunity of considering the exact point raised by the Court, and whether he would or would not apply to the Attorney-General for a certificate which would enable him to go to the House of Lords the question arises, as Mr. Justice Pickford just put to me, as to what is the position of the defendants in the meantime.

The only section of the Act which I have found which appears to have any bearing upon the point is s. 4, sub-s. (2). "Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

Now, my Lords, I have already pointed out that by s. 1, sub-s. (6), the appeal is to be final, subject to any appeal to the House of Lords. Then under sub-s. 7 of s. 1: "The Court of Criminal Appeal shall be a superior Court of Record, and shall for the purposes of *and subject to the provisions of this Act* have full power to determine in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court." A question might arise as to whether that section would give power to take any steps to either bail the defendants or detain them.

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[Mr. Justice Darling: How can we hold them to bail? There is no charge against them.

The Lord Chief Justice: Where is the power to imprison or to hold to bail? That is my difficulty. What answer would there be to *habeas corpus?* Do you say we can make an order to hold to bail an innocent person?]

I quite feel the difficulty that arises on this section. Of course, there has been a conviction against these people, and against that conviction they have appealed.

[Mr. Justice Darling: There has been a wrong conviction.]

This appeal has been allowed by this Court, but by s. 1, sub-s. (6), the decision of the Court of Criminal Appeal is not to be final if the House of Lords comes to an opposite conclusion to that which the Court of Criminal Appeal has come to. The question of bail is dealt with by s. 14, sub-s. (2): "The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of *his* appeal." Of course, a question might arise there as to whether the defendant's appeal was only an appeal to this Court, or in the event of there being any final appeal to the House of Lords, whether the appeal would still continue to be his appeal.

[Mr. Justice Pickford: At the present moment there is no *fiat* of the Attorney-General, and therefore this decision is final. Unless the Attorney-General thinks fit to grant his *fiat*, what power is there to hold them to bail while the Attorney-General thinks about it?]

That is the difficulty under this Act. It would be quite impossible to ask the Attorney-General to grant his *fiat* until he has had an opportunity of considering what the judgment of the Court is and the exact way in which it has been framed.

[Mr. Justice Pickford: And if he should decide not to do so, the conviction of the prisoner has been quashed. The decision

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of this Court is final, and you are holding to bail persons against whom there is no conviction at all, and no appeal pending; that is the difficulty as it seems to me.]

The only thing that occurs to me as possible, having regard to s. 1, sub-s. (7), which gives the Court power to determine in accordance with this Act any question necessary to be determined for the purpose of doing justice in the case before the Court is whether, when there is a chance of there being any appeal to the House of Lords it would be possible for the Court, after intimating, as they have done this morning, what their judgment is, to postpone the formal drawing up of that judgment and in the meantime, so that no injustice might be done, admitting the defendants to bail.

[Mr. Justice Darling: The only way in which I can think that you might possibly do this is having regard to sub-s. 2 of s. 4, "subject to the special provisions of this Act." If you could say that this right of the Director of Public Prosecutions to go to the Attorney-General and the Attorney-General to issue his *fiat* is one of the matters brought in under "subject to the special provisions of this Act," you might say then that this Court could quash the conviction subject to that, that it should not quash it to-day, but should quash it subject to the Attorney-General not issuing a *fiat;* but I do not know that that can be done.]

If the Court take that view, then there would be, of course, power in this Court, pending the formal decision, to grant the appellants bail.

[Mr. Justice Darling: Then the difficulty would be this. If you could do it in that way and say we quash the conviction subject to the Attorney-General issuing his *fiat,* who would be the appellant if he issued his *fiat* and went on? The conviction would be quashed, and it would be for the appellant to begin again, would it not?]

I imagine that your Lordships would only postpone the order for a limited time.

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[Mr. JUSTICE DARLING: "Direct a judgment and verdict of acquittal to be entered"; that is the thing we have to do.]

Yes, "subject to the special provisions of this Act." I do not know if your Lordships have in mind Form 32, which has to be issued by the Registrar of the Court of Criminal Appeal. The Registrar is to give notice that "the Court of Criminal Appeal has *finally* determined the said appeal, and has this day given judgment therein to the effect following."

[Mr. JUSTICE DARLING: Suppose the Attorney-General does not issue a *fiat*—I do not talk of this particular case, but any case like it—suppose the Director of Public Prosecutions applies, and the Attorney-General refuses his *fiat*, and meanwhile the Court has held the successful appellants to bail, they would have held to bail persons who were entitled to a verdict in their favour or judgment in their favour, and an order for their release. What power have we to do it? They would be as free as any other citizens. The Lord Chief Justice says you might have put them to the trouble and expense of getting bail, although they were people who were as much entitled to be at liberty as you and I.]

I quite feel the difficulty which arises under this particular section.

The LORD CHIEF JUSTICE: This application raises a very important question, and one which has been considered before, though the Court of Criminal Appeal has not had any application before it. In my judgment the language of the Act is not sufficient to enable us to direct a successful appellant to remain in custody or to be held to bail. The only words in the Act under which it can possibly be said the power may exist is under the words: "Subject to the special provisions of this Act" in sub-s. 2 of s. 4. "The Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered." It is said quite properly on behalf of the Director of Public Prosecutions that one of the special provisions of the Act is that con-

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tained in sub-s. 6 of s. 1. In our opinion those words are not sufficient. We are dealing with a very important matter, the liberty of the subject, and the power either to imprison or hold to bail the defendant, who at the present moment is an unconvicted prisoner. We have no power to order a new trial, and, so far as I know, the House of Lords has no power to order a new trial, though they might uphold the conviction. These words, though they are not sufficient for the purpose, are clearly required for other purposes such as I have pointed out, because there is a special power in this Act to enter another conviction and to award another punishment, and so make an order which does not involve a judgment and verdict of acquittal, although the particular conviction may be quashed. In the circumstances it seems to me that to authorise holding a person to bail, and still more imprisoning that person, special words would be required.

Now it is said that something of the kind must have been contemplated when s. 1, sub-s. 6 of the Act was framed, and that under sub-s. 6 we should have inherent power to make an order. In my opinion, if sub-s. 6 is considered, that argument loses its weight. I have no doubt in my own mind, looking at the Act, and the Act only, that the object of sub-s. 6 was not so much to deal with a particular appellant, and a particular prisoner or person charged, as to enable the view of this Court on a matter of law to be subject to review, and it will be observed that it is not that the Attorney-General may, if he thinks fit, direct an appeal to the House of Lords in any case. This power might have been given to him, and, having regard to many other powers the Attorney-General does possess, and has possessed for a good many years, both with regard to error and other points—it would not be at all an unreasonable provision if that had been enacted, but the words are: "If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance"—that in my opinion points to the sub-section being inserted in order not so much that justice may be done in a particular case, either by the way of conviction or by the way of acquittal, as that there may be a determination of the highest tribunal of the land upon a point of law of exceptional public importance. Without suggesting in the least to the learned Attorney-General what his duties

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are, it is quite obvious that what he has to consider is not only the question of whether there will be a conviction or an acquittal, but whether or not the decision of this Court involves a point of exceptional public importance.

I am quite sure the Attorney-General, whoever may fill that great office, will apply his mind to that question. It seems to us that it being for the public interest, that there should be in the particular case a further inquiry with the safeguard of the *fiat* of the Attorney-General, we ought not to construe these words as giving us sufficient power to keep in prison, and to hold to bail a person who is for the moment, on the judgment of this Court, declared to be an unconvicted person, and the difficulties pointed out by two members of the Court in the course of the argument seem to me to be insuperable. The Attorney-General may refuse, or may take time to consider the case, and whether it is a point of public importance. What is the power to hold to bail during that intermediate time, and still more, what is the power to hold a person imprisoned during that time? I think, therefore, we can make no order upon this application.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PICKFORD AND MR. JUSTICE CHANNELL.

HARVEY HAWLEY CRIPPEN.

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If, in an emergency, a juror must be separated from the rest of the jury on a trial for treason, treason-felony or murder, it is not essential in law (though it is advisable) that the bailiff who accompanies him should be sworn. It is not a mis-trial if the Court is satisfied that there was no opportunity of tampering with the juror.

It is within the discretion of the judge at the trial whether evidence, admissible in chief, should be admitted in rebuttal, but that discretion is subject to review on appeal.

A summing up, criticised for misdirection, must be considered as a whole.

This was an appeal on grounds of law against conviction, and an application for leave to appeal against the conviction on grounds of fact, and also from the refusal of Ridley J. to allow appellant to be present. Appellant was convicted before the Lord Chief Justice at the Central Criminal Court on October 22nd of the murder of his wife, and sentenced to death.

Tobin, K.C. (with him *Huntley Jenkins* and *H. D. Roome*), for the appellant, who was not present till evidence was called.

The first ground of appeal is that one of the jurymen absented himself from the other jurymen without having been given into the charge of the proper officer of the Court. He was taken ill on the second day of the trial and left the box, the other eleven remaining in the box. He was attended by three doctors, Dr. Willcocks and Dr. Marshall, who were witnesses for the Crown, and Dr Dyer, the medical officer of Brixton Prison. [An affidavit to this effect was then read to the Court.] Of course, there is no suggestion that any one of the doctors said anything to the juror concerning the case. But it is a serious matter of prin-

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ciple. No bailiff was sworn to take charge of him while he was sick: he ought to have been given in charge while the remaining eleven continued under the eye of the judge. Who is to know what really happens? The juror should not speak to anyone at all. If such a thing was allowed, the practice might go to great lengths. The eleven jurymen ought to have been re-sworn, and a new juror added, and the case started anew. The old common law is quite clear that in cases of felony a jury was not allowed to separate. Then by 60 & 61 Vict. c. 18, the Juries Detention Act, 1897, juries could separate in cases of felony, but not in murder, treason, or treason-felony. When the trial is adjourned, all twelve are put in charge of two sworn bailiffs for the night, and if one juryman has to separate from the others for a necessary purpose, a bailiff accompanies him. The bailiff is the one connecting link between the juror absenting himself and his fellows. No doubt the jurors in murder cases would sleep in different beds, but on those occasions the Court has adjourned and the jury would then be in charge of two sworn bailiffs; in the present case the Court did not adjourn during the absence of the sick juror.

[PICKFORD J.: Why should the bailiff be sworn? Is not the only object of the swearing to give the Court security that the bailiff shall perform his duty? Suppose the jury were in charge of a bailiff who was not sworn?]

In a murder case the Court ought to have the highest security, and ought to appoint the bailiff for the purpose.

[DARLING J.: As an affidavit has been sworn, we ought to ascertain the facts, and, as evidence is to be called, the appellant had better be present.]

Herbert Austin, deputy clerk of the Central Criminal Court, examined by *R. D. Muir* for the Crown, said that during an adjournment, and at the end of each day of a trial, the jury were in charge of the sheriff, who was represented by two bailiffs, who were sworn to keep them under supervision. On the second day of the trial, about 11.30 a.m., one of the jurors was taken ill. The practice of the Central Criminal Court in these circumstances

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was that the bailiff and crier, or some officer of the Court goes out of Court with the juror, but is never sworn. The Court did not adjourn till 12.20, when Dr. Dyer came back to the Court and gave his report on the condition of the sick juror; thereupon he (the witness) swore Dr. Dyer and the bailiff to look after the jury during the adjournment. The Court sat again at 2 p.m.

James Phillips, a bailiff and crier at the Central Criminal Court, proved that he was sworn to take charge of the jurors during adjournments. The jury in this case had slept at an hotel in the city at night; they had separate bedrooms and a corridor to themselves. The two bailiffs were also with them at night. When the juror was taken ill, he himself led him out of Court and supported him, as he was in a state of collapse, and with the doctors led him to an open space behind the Court, where the public had no access; he never went out into the street, and of the few people they passed in the halls on the way, no one spoke to him, and if any one had done so, he was too ill to reply. They were all together for about three quarters of an hour. The juror rejoined his fellows soon after one o clock. He had never left him from first to last. Another bailiff was in charge of the remaining eleven. He himself was not re-sworn on the 19th, the second morning of the trial.

This evidence was corroborated by another bailiff and by Dr. Dyer.

Tobin, K.C.: This is a different case from that where a juror leaves for a particular purpose. Here he goes through a corridor, and a couple of halls, about which several people are standing, and he goes away in charge of an unsworn bailiff. It is true the juror was in rather a collapsed state, but, on the facts just sworn to, it is clear that serious consequences might ensue from such an irregularity. In a case of murder, I submit the bailiff ought to have been sworn. If that be so, the question arises, has the Court power to quash this conviction? My submission is that notwithstanding the limitation of the Court's power, under s. 4 of the Criminal Appeal Act, 1907, the Court can quash the conviction on the ground that the learned Lord Chief Justice, in allowing the trial to proceed after the irregularity, came to an erroneous deci-

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sion on a question of law. If this be not the true view, there would be no remedy, for the Court of King's Bench would not grant a *venire de novo*, inasmuch as a verdict has been given and sentence passed, without any irregularity appearing on the record. *Murphy*, L. R. 2 P. C. 535; 38 L. J. P. C. 53 (1869). It is clear from Sir William Erle's judgment at p. 548 (L. R.) that I have no remedy unless I can come to this Court and say that this is a wrong decision of law on the part of the Lord Chief Justice. There is, so far as I know, no reported case or authority against my contention.

[PICKFORD J.: But, on principle, how can it matter whether the bailiff be sworn or not, provided he do his duty?]

You might apply that to a witness; it is clear great laxity would prevail.

R. D. Muir (with him *Travers Humphreys* and *S. Ingleby Oddie*), for the Crown. I submit that the principle with regard to the separation of jurymen is that unless it can be shewn there has in fact been some tampering with jurors in consequence of the separation or grounds for suspecting it, that the separation does not produce a mistrial. *O'Neill and Henderson*, 3 Crawford and Dix, Irish Circuit Reports, 146 (1843). In that case, which was a trial for larceny, a juror left his fellows under the impression that the case was over, the Court having adjourned. The juror in question went into the town, and was only brought back after a search of one hour and a half. The Crown counsel, on being asked by Brady, C.B., what course he would take, elected to take the risk of proceeding with the trial. The prisoner O'Neill was convicted, and a motion for arrest of judgment on the above facts was refused. *Fowler*, 4 B. & Ald. 273 (1821), is not an authority against me. See Archbold, 24th ed., p. 353, and *Murphy* (above).

With regard to the practice at the Central Criminal Court, the practice is that a bailiff accompanies the juror, but is not sworn. The practice on circuit is the same. I submit that that practice is correct.

Tobin, K.C., in reply. *O'Neill* does not seem to have been fol-

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lowed in England. I remember a case at Northampton before Kennedy J., the "Althorp murder," on November 17th, 1892, in which the learned judge, owing to the temporary absence of a juror, travelled up to London to consult Lord Coleridge C.J. on the point. The case was then re-tried before a second jury.

[DARLING J.: It does not follow that the course pursued by Brady C.B. in *O'Neill's* case was wrong.]

DARLING J.: We will deal with this point before hearing the other grounds of appeal. The argument comes merely to this, that although the bailiff had been sworn at the beginning of the trial, when this juryman was taken ill, and it was found necessary to conduct him out of Court, he was accompanied by a bailiff who was not sworn again, and also by doctors who examined him and asked him necessary questions on his condition. We think that the rule that jurors must not separate does not mean, and never did mean, that they must be kept physically together in some narrow space or room, because of necessity where trials last a long time, some of the jurors must occasionally be separated from the rest. It appears that the bailiff was sworn at the beginning of the trial. Then suddenly at about 11.30 a juror was taken ill, and the Lord Chief Justice directed or permitted doctors to attend to him. He was then almost in a state of collapse. The doctors came to the conclusion that he ought to be removed from the jury-box. We think that all the rules are subject to modification in cases of emergency; it is clear a case might well arise when it would be found necessary to take a juror away before there was time to go through the formality of swearing a bailiff. We are of the opinion that it is not necessary on such occasions that the bailiff should be sworn at all. Of course it is advisable that he should be sworn as some security that he would not allow the juryman to be tampered with, and also because it would impress the juryman himself with the fact that he was not to use the occasion of his separation from the rest to discuss the case with anyone.

We think that nothing has been decided by the Lord Chief Justice contrary to law, and that what he did was justified by *Reg.* v. *O'Neill and Henderson* (above). Indeed, that case went much further than this. Then comes the question, can it be

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shewn that the principle was violated which says there must be no opportunity of tampering with the juror? If we thought so we might be satisfied there had not been a fair trial, and would then quash the conviction. But so far from there being any evidence of such an opportunity, the evidence shews that there was no opportunity whatever, that no one spoke to the juryman except the doctors, that the bailiff was in charge of him all the time, and accompanied him, the doctors, and another bailiff when he went back to the jury box. Nor is there even a suggestion that there was any tampering with him in fact.

Therefore on this point the appeal fails.

Tobin, K.C.: The second ground of appeal is that the evidence of James Chilvers was wrongly admitted. After the case for the defence had been closed, Mr. Muir asked leave to call a fresh witness by way of rebutting evidence. The true view of the law about rebutting evidence was that evidence which could have been given as part of the case for the prosecution could not be adduced after the evidence on both sides has closed, if it was for the purpose of strengthening the case for the prosecution. It could only be given to rebut a case set up by the prisoner which the Crown could by no ingenuity have anticipated. *Frost*, 4 St. Tr. N. S. 85, 386; 9 C. & P. 159 (1839); *Stimpson*, 2 C. & P. 41 (1826); *Hilditch*, 5 C. & P. 299 (1833). It could not be said that the evidence in the present case was to rebut something unexpectedly set up by appellant in his defence. *Hilditch* establishes this; that any evidence that is confirmatory of the original case of the prosecution cannot be given as evidence in reply.

I submit that if I can establish that this evidence, which could have been given in the first instance, was wrongly admitted, this Court can quash the conviction. Counsel for the prisoner is placed in a fearful difficulty—no material on which to cross-examine, no opportunity for inquiry. The learned judge laid tremendous stress on the evidence so admitted, and its effect was damning in the last degree. It must necessarily have had a great effect on the jury.

[Darling J.: Would not the effect have been the same if the evidence had been given in chief?]

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To allow evidence, that could have been given as part of the original case for the prosecution, to be given by way of rebuttal would lead to a very lax procedure. The facts were that on July 13th, four days after the flight of appellant, and some six months after the disappearance of his wife, there was found under the cellar at his house part of a pyjama jacket, together with some human remains; on the part of the jacket so found there was a tab inscribed with the name of "Jones Bros. Ltd." On July 14th there was found at Crippen's house two complete suits of pyjamas and one odd pair of trousers, the pattern of the latter, but not that of the complete suits, being the same as that of the portion of jacket found in the cellar with the remains. The cross-examination of the Crown's medical witnesses was directed to shew that the body might have been buried some time before February 1st, 1910, the day on which the prisoner's wife disappeared, *i.e.*, while she was still alive. The Crown was perfectly entitled to call as part of the original case evidence to shew that the jacket with the tab had been in possession of Crippen very shortly before the disappearance of his wife. The evidence of Chilvers was that he was a buyer to Jones Brothers, and that the two complete suits of pyjamas, and the odd pair of trousers and a pyjama jacket similar in pattern to the odd pair of trousers were delivered at appellant's house in January, 1909, he thought on the 5th. He said they were sold between December 28th, 1908, and the end of January. The Crown could well have proved all these facts as part of their original case. Appellant had said nothing in cross-examination to justify the prosecution in giving such evidence in rebuttal. All Crippen said was that he purchased a couple of suits in September, 1909, and that the odd pair of trousers formed part of a suit he had bought a considerable while before, perhaps in 1905, and were worn out and disappeared. The Crown was not taken by surprise: it knew that the defence would be that the remains were buried before Mrs. Crippen disappeared. See *White*, 2 Cox C. C. 192 (1847). The Lord Chief Justice laid great stress upon this evidence.

[CHANNELL J.: Why should it have a weightier effect than if given in chief?]

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I do not say so. I say that I could have made inquiries and dealt fully with the matter. The material was of a very ordinary pattern.

[CHANNELL J.: Is not your real grievance that a trap was laid?]

[DARLING J.: Could the prisoner have answered any differently even if the Crown had adduced the evidence in chief?]

The evidence was sprung upon me as a bolt from the blue, and after I had completed my case. I submit the Crown was bound by appellant's answer in cross-examination.

[CHANNELL J.: That depends on whether it is collateral matter or relevant to the issue.]

I agree; if relevant the Crown could and ought to have given it in chief. We must be absolutely strict in the procedure of criminal trials.

I now come to the last ground of appeal. I submit that with regard to the remains found buried under the cellar floor at the house, it was not established that they were the remains of a woman; still less was it established that they were the remains of Mrs. Crippen. There was no evidence to indicate the sex; the evidence for the prosecution was that no limbs, no bones, and no head had been found. With the remains were discovered some long hair in Hinde's curlers (which hair, like that of Mrs. Crippen, had evidently been bleached), some portions of a woman's clothing, and some of a man's (the pyjama jacket). So that what was found with the remains left the question of sex unsolved. I complain of the summing up upon this part of the case. The learned judge said "that these are the remains of a woman is not seriously disputed." I fought that point tooth and nail. Such an observation had very great weight. Again, the learned judge said, "Why should the body be clothed in a woman's vest? Why should there be a woman's vest with lace on the arms?" There is not a tittle of evidence of the "body being clothed." All that was found were some loose bits of flesh and clothing; no arms or limbs of any kind.

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The Crown had also produced a piece of skin measuring 7 in. by 6 in. It was proved, and indeed not seriously disputed, that this had come from the lower part of the abdomen of somebody. The doctors for the defence had held a different opinion, but, on further consideration, abandoned their former opinion. The Crown said that this piece of skin bore upon it a scar measuring a little over 4 in. long, similar to a scar caused by an operation performed for the removal of the ovaries—just such an operation as Mrs. Crippen had undergone. Drs. Turnbull and Wall, men of the highest qualifications, called for the defence, thought that the mark was caused by the folding of the skin, and that the pressure upon it while buried in the ground was severe, was clear from the fact that the lines of some material buried with it were impressed upon the skin in one place. Professor Pepper said the piece of skin covered the place where someone's navel had originally been, and that the navel had been removed. The defence on this point was proved out of the mouth of the Crown's own witnesses. One of the Crown witnesses—a friend of Mrs. Crippen—said the latter had a navel, that it had never been removed, and that she had actually seen it.

[Darling J.: Are we to ignore the earlier opinion of Drs. Turnbull and Wall that the skin came from the thigh? They absolutely abandon this opinion, although they had submitted it in a written report.]

At least they adhered to their contention that there was no scar. There were hair follicles there which could not have been present had there been a scar.

I contend that the learned Lord Chief Justice did not accurately direct the jury in the matter as to the burden of proof. The learned judge was reported to have said: "In order to satisfy you that it is not Cora Crippen, the defence must have satisfied you that there is no scar there, because then of course if there was a scar there, coupled with the pyjama, the camisole, the combinations and the vests, you have to ask yourselves, have you any doubt that that is the body of Cora Crippen?"

The last point was as to whether the hyoscin said to have been found with the remains could establish identity. The questions to be asked were, had appellant any legitimate reason for buying

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hyoscin, and secondly, was it hyoscin in the remains? Hyoscin is a mydriatic vegetable alkaloid used in nerve diseases. Appellant was agent for "Munyon's Remedies," and prepared prescriptions. He bought the poison quite openly, and signed the book in his own name when there was really no need for him to do so. It was conceded by the Crown witnesses that mydriatic animal alkaloids could be produced in putrefying meat. If so, then why not in flesh or human remains? Science shews it is impossible to say whether the alkaloids undoubtedly found were vegetable or animal. I submit it was not proved that there was hyoscin in the remains.

R. D. Muir, for the Crown, was only called upon as to the rebutting evidence.

The admission of rebutting evidence is a question for the discretion of the presiding judge. The exercise of such discretion is subject to review by the Court of Appeal. *Wright* v. *Willcox*, 9 C. B. 650; 19 L. J. C. P. 333; 14 Jur. 746 (1850). My submission is that *Hilditch* (above) was wrongly decided. In that case, an *alibi* having been set up, Taunton J. refused to allow evidence in rebuttal to shew that the prisoner had been seen near the spot. Discretion there was wrongly exercised.

[Darling J.: No doubt it is a matter for the discretion of the judge. There is no need to argue that point. But suppose he does exercise his discretion, and the evidence is admissible if taken in chief, what are the consequences of his exercising his discretion in a wrong way?]

None. The facts with regard to the evidence of Chilvers were these: his statement was not delivered to the Crown counsel till after the trial had begun; the first part of it was taken on the night of the 17th October, that is the night previous to the trial, but not delivered to counsel until after the trial had begun; the identification by Chilvers of the remains of the jacket found in the cellar did not take place until after 2 p.m. of the second day of the trial. We had then to consider whether we ought to give notice to the defence that we intended to give the evidence in chief, or whether on the other hand we should leave our case as it was. The pyjamas were not sold earlier than December of 1908, *i.e.*, fourteen months before the date of the

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disappearance of Mrs. Crippen. Upon the evidence as it stood, the remains could not have been more than eight months at the very most before July, 1910, in the ground; that evidence was uncontradicted. Now even at that late stage we could have given the evidence in chief after giving notice. We did not think it necessary to do so. If appellant had not given a definite statement as to the time of purchase, the evidence would never have been tendered. It was because he said he bought the pyjama trousers so long ago that the jacket had been worn out and thrown away long before these remains could have been buried, that we called Chilvers to prove that the jacket was bought with the trousers between December, 1908, and the end of January, 1909. The firm only became a limited company in 1906. We called Chilvers then, with the leave of the Lord Chief Justice, to rebut the evidence of Crippen. I submit the Lord Chief Justice rightly exercised his discretion in the matter.

Tobin K.C., in reply: Nothing at all was said by appellant in his evidence in chief upon the point. When Mr. Muir rose to cross-examine him, he had before him the damning proof of Chilvers. He led appellant on to give certain answers inconsistent with what he, Mr. Muir, knew was to be found in Chilvers's proof. The evidence could have been and ought to have been given in chief.

DARLING J.: Since we decided the first point raised by the appellant, Mr. Tobin has taken further points. The first of these is that we ought to quash this conviction because the Lord Chief Justice improperly allowed the prosecution at the close of the case for the defence to call evidence in rebuttal. There is no doubt that the rule is that a judge, in considering whether he will allow such evidence to be called, should consider whether that evidence could have been given or ought to have been adduced by the prosecution as an original part of their case and before they closed it. We do not feel inclined to lay down the rule in the words of Tindal C.J. in *Frost's* case (above) at col. 386: "There is no doubt that the general rule is that, where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must

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close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." We should not put the rule in those words. In the first place, the rebutting evidence must be evidence admissible in the case. Supposing it to be admissible, it then becomes a question for the judge at the trial to determine in his discretion whether the evidence, not having been given in chief, ought to be given as rebutting the case set up by the defence. In coming to his decision, he should have regard to what had been laid down in the cases cited by Mr. Tobin. The matter, however, was one within the discretion of the judge presiding at the trial, who was of course in a much better position than any Court of Appeal to determine whether it was really fair to allow it to be given, and whether it did or did not expose the defence to a disadvantage to which they ought not to be exposed. It does not appear to have been laid down in any case that, if a judge exercises his discretion in a way different from that in which a Court of Appeal would have exercised it, that fact alone is sufficient ground for quashing a conviction. The only case where anything of the kind was suggested was that of *Wright* v. *Willcox* (above), where the Lord Chief Justice said: "The time at which evidence is to be received must be in the discretion of the judge, the exercise of that discretion being subject to the review of the Court." There was nothing in the judgments of Maule, Creswell and Talfourd JJ., the other judges in the case, to the same effect. Maule J. said: "The objection to the reception of the evidence was that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised frequently occur. When a party has closed his case he often asks and is allowed to supply a deficiency." No doubt the question was one for the discretion of the judge at the trial, who was necessarily in a far better position to exercise it than the Court of Criminal Appeal could possibly be.

All we can say is this: the evidence admitted in rebuttal was admissible evidence, and the Lord Chief Justice saw no reason why, in fairness to the defence, it should not have been given. He has exercised his discretion, and, even granting that we have

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the power to do so, we see no reason why we should interfere with it.

But we wish to add a few words to what has been said. If it were shewn that the prosecution had done something unfair—had set what had been called a trap—which resulted in an injustice to the prisoner, this Court reserves to itself full power to deal with the matter. It is only necessary to say that in such a case we should probably come to the conclusion that there had been a miscarriage of justice, and exercise the powers given to us by s. 4 of the Criminal Appeal Act, 1907. But there is no reason to suppose that anything of that kind has taken place here. Therefore on this second ground of appeal we see no reason to interfere with the conviction.

With regard to the next ground, that there was no proper evidence before the jury to establish the fact that the remains found at appellant's house were those of a woman, and that in any case there was no sufficient evidence to prove they were the remains of Mrs. Crippen—with regard to this ground Mr Tobin, in the course of his argument, went into the evidence given by the doctors on both sides as well as into the evidence as to what was found buried with the remains—the clothing and other articles. We think that there was evidence for the jury, and a great deal of evidence, which would justify the verdict at which they arrived, and to establish the fact that these remains were those of Mrs. Crippen. With regard to the evidence of the doctors concerning the piece of flesh and skin, we are not surprised that the jury preferred the evidence given by the medical men called for the Crown. The doctors called for the defence, when cross-examined, had been obliged to abandon an opinion they had expressed with confidence, and which, moreover, they had committed to writing. We do not wish to say anything more by way of criticism of them than that.

It remains for us to deal with the criticism that was directed to the summing up. Mr. Tobin has said, in the course of his argument, that every point that had been made on behalf of the prisoner was put to the jury, and put fully and fairly. But he has criticised a phrase used here and a phrase used there in the course of a long summing up. Sitting in this Court, we have often said in similar cases that we should not interfere where attention is called to phrases ambiguously used and not expressed quite so fully and clearly, or not expressed with the exactitude

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which, as counsel points out, might have been used. We must look and see whether, taking the summing up as a whole, the judge has put the issue fairly to the jury; whether all the evidence was before them, and whether the judge adequately directed the attention of the jury to where lay the burden of proof. We think it is plain that in this case the Lord Chief Justice did not leave the jury with any false impression as to the burden of proof. Mr. Tobin has argued that that was not so, but we will read one passage from the summing up to shew how clearly the matter was put to the jury. The Lord Chief Justice said: "Now, gentlemen, I have left that part of the case as I have told you. I have dealt with it first because, if you believe the story of the defence, it is a conclusive answer to this charge, and you need not trouble about the other points . . . and if upon considering the whole of this case you come to the conclusion that you are not satisfied with Crippen's account, then you have to consider with me whether the Crown have established their case upon the two issues of Cora Crippen's remains being those found in the house, and of that woman having been poisoned by the act of the defendant. Of course, if that is true, it is a further contradiction of the story he has told you." In those words the law was clearly laid down. The burden of proof lay upon the Crown. If when the prisoner had given his account the jury believed it, the case for the Crown necessarily came to an end. But if they did not believe it, even then the jury were entitled to acquit him, because it still remained with the Crown to prove that the prisoner killed his wife, and that the remains found at Hilldrop Crescent were those of Mrs. Crippen.

We think that, notwithstanding the criticism that has been levelled at the summing up, it did put adequately, fully, and fairly the complete case for the prisoner, and that no injustice has been done by any term, phrase, or sentence used in the summing up.

We consider there was ample evidence to support the verdict of the jury, and that, on all the points taken, the appeal fails.

Appeal dismissed.

Solicitor for the Appellant—*Arthur Newton & Co.*

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE PICKFORD.

JOHN FISHER.

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Severity of sentence.

Appeal from sentence by leave of Ridley J.

Appellant was indicted at the Quarter Sessions for the Borough of Great Yarmouth on the 14th of October, 1910, for having stolen on the 30th of August, 1910, one pair of slush boots and one pair of trousers of the value of 35*s*. He pleaded guilty and was sentenced to twenty-one months' imprisonment with hard labour. He was a fisherman employed on the smack "Pansy" of Great Yarmouth. It is the custom of that port that at the commencement of the fishing season, the owner of the vessel shall supply the members of the crew with all necessary sea clothing; that this clothing shall remain the property of the owner until the fisherman shall have paid for it out of his earnings in the fishing. Appellant was taken by the owner and the master of the vessel to an outfitter on the 18th August, 1910, and was then supplied (amongst other things) with a pair of slush boots, and he signed the usual printed form of acknowledgment as to the ownership of the articles. Early on the 30th August, 1910, whilst the "Pansy" was in port, he took a new pair of trousers, which had been provided for another member of the crew, from the vessel and pawned them for 3*s*. 6*d*. Later in the morning he took the slush boots and pawned them for 13*s*. 6*d*. Most of the money he appears to have spent in drink.

Between the 16th August, 1900, and the 10th April, 1908, he had been convicted of larceny on ten occasions; there were also four summary convictions against him for drunkenness. The sentences ranged from fourteen days' imprisonment to three

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years penal servitude. In 1907 he was imprisoned under the Borstal system for twelve months, but he had only been released five weeks when he was again charged with larceny. For this offence (in April, 1908), he was sentenced to three years' penal servitude. He obtained his discharge from prison on the 25th July, 1910, on ticket of leave. The offence with which he was now charged having been committed on the 30th August in the same year, consequently the prisoner had to serve 258 days under his last sentence in addition to any term imposed upon him for this offence.

He appealed in person against the sentence, on the ground that it was too severe having regard to the fact that he had nearly nine months to serve under his old sentence.

H. Claughton Scott, for the Crown, offered no objection to a reduction of sentence.

The Court reduced the term of the sentence to twelve months.

Sentence reduced.

Joseph Bundy.

JOSEPH BUNDY.

Misdirection as to the evidence of identification of the defendant may be a ground for quashing a conviction.

This was an appeal against conviction by leave of Ridley J. Appellant was convicted of larceny on August 15, at the London County Sessions, was sentenced by the Deputy-Chairman to twenty-one months' imprisonment with hard labour.

Watt for the appellant (under s. 10 of the Criminal Appeal Act), who was present. This appeal is based on the ground of improper admission of evidence, misdirection, and unsatisfactory evidence of identification. The facts were these: Butler, a baker, sent out his man Agar with a horse and van to deliver bread. When Agar arrived at a public-house called the "Lord Chancellor," he said he noticed two men in front of it, of whom one was the appellant and the other a man named Smith. When Agar

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came out of the "Lord Chancellor" some time later the horse and van were gone. Smith still stood there, but the other man had disappeared. The horse has never been seen again, but the van was subsequently found at Paddington Green.

At the trial counsel for the Crown called evidence to shew that appellant's friends had threatened the witnesses for the prosecution. This came out as evidence in chief. It must have had a great effect on the mind of the jury. It ought never to have been received. It was clearly not evidence against appellant. Even if the evidence were true, the appellant had not been allowed out on bail, and therefore he could not have been concerned with the menaces. It is true the learned Deputy-Chairman directed the jury to disregard the evidence, but this did not necessarily remove the impression it might have made on the jury's mind. My next submission is that the identification of the appellant by Agar and Smith was in the highest degree unsatisfactory. Agar had only the merest glimpse of the two men he said he observed outside the "Lord Chancellor." At the trial Smith seemed to identify the appellant very clearly. But on being recalled, it was found he had not at any time seen the appellant's face. At the police station he only identified the appellant when a detective said the appellant resembled the man the police suspected of having committed the larceny. I submit it was the duty of the learned Deputy-Chairman to call attention to the weakness of this evidence. The summing up merely contains this direction on the identification proceedings of the police court. "This man placed himself with others in a row. . . . . Agar came in and picked him out at once, because he had seen him loitering. . . . Smith picked him out as the man he had seen putting the bit in the horse's mouth and taking off the nose-bag . . . although he did not see his face, and had only seen his back. . . . It is an extraordinary thing he should pick him out if he had only seen his back. That is the identification."

It is true that when asked whether he had any questions to ask after Agar's evidence had been given, he replied in the negative. But he had brought two witnesses to prove an *alibi*, and so did not think it necessary to cross-examine.

P. T. Blackwell, for the Crown: It is true I acted on the

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suggestion as to appellant's friends threatening the witnesses for the prosecution. I do not propose to defend that course now.

As to the identification, I submit Smith's identification was perfectly satisfactory. He did not see the man's face outside the public-house at the time, but he was perfectly familiar with appellant's features; he had seen appellant several times. If he saw the back of the man with whom he was so familiar, is that not enough?

[PICKFORD J.: Smith says in his evidence: "I could not identify him till I was told he was the man who was suspected." How do you answer that?]

I submit it was for the jury.

PICKFORD J.: In this case appellant was convicted of stealing a horse and van. His conviction rested mainly on the evidence of identification by Agar and Smith. Agar, the driver of the van, said that when he arrived with the van at the place from which it was subsequently stolen, he saw two men, one of whom was Smith and the other the prisoner. Smith said he saw the prisoner go up to the van after Agar had left it, stroke the horse's nose and then drive away. When it came to the evidence of identification, Agar gave his evidence quite clearly. He was, however, recalled, the foreman of the jury not being satisfied. The foreman wanted to know whether there was anything especially causing the witness to notice the prisoner. Agar said that the reason he noticed appellant was because as a rule no one was about the place except Smith. He said: "I did not take particular notice; I just caught his eye; it is seldom anyone stands outside there." This shews he only had a very slight opportunity of seeing the man. Smith only saw the back of the appellant; he identified him when he saw his face on a later occasion. The serious feature about Smith's identification is that his cross-examination shews it to be valueless. He was first asked, "When you picked him out you had seen him before?" and replied, "Yes, I saw his back." Then to the question, "But you did not see his back at the police station?" he answered, "No"; and, finally, to the question "Then how came you to pick out this man?" he actually answered "Because he very much resembled the man

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they [the police] had suspicion of," and then afterwards admitted the detective had told him of their suspicions of the appellant. If all this were true, the evidence of identification was wholly valueless, because it is an admission that, until he was told by the police officer that appellant very much resembled the man they suspected, he was quite unable to identify the man. It was an extremely improper thing to do. But what is also of greater importance about the matter is that it throws some doubt on the whole of the identification in this case, including that of Agar. If all that had been pointed out to the jury, we might not have interfered with the verdict. But it was not pointed out at all; so far from the vice in Smith's evidence being alluded to, it was pointed out as being extremely strong. The jury were therefore not directed by the learned Deputy-Chairman to the vital point.

Then a question had been asked as to whether the witness, Smith, had been intimidated by friends and brother-in-law of the appellant. But the learned Deputy-Chairman rightly told the jury to disregard all that. If that incident stood by itself, it is probable we would not have interfered with the verdict.

In all the circumstances, it is clear the trial was not satisfactory, and the case was not put to the jury in a way to insure their due appreciation of the value of the evidence.

Conviction quashed.

A. R.

WILLIAM COOPER.

William Cooper.

Severity of sentence in the case of incorrigible rogues.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted at the London County Sessions on 13th October as an incorrigible rogue, and sentenced to twelve months' imprisonment with hard labour.

Appellant, who was present, was not represented.

Lawrie, for the Commissioner of Police, was not called upon.

Darling J.: The Appellant in this case was convicted by a

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metropolitan police magistrate of being an incorrigible rogue, and was thereafter sentenced by the Quarter Sessions to twelve months' imprisonment with hard labour. Under the law as it stands, this, of course, was the maximum sentence that could be imposed. There can be no doubt the conviction was perfectly right, for there were sixteen previous convictions against the appellant, nearly all of them being for begging; the evidence in this case was that he begged a man to give him 2*d*. in order, as he said, to buy a cup of coffee. So that the only question is whether, in all the circumstances, it was right to impose the maximum sentence? We have already laid down the principles on which the maximum sentence should be imposed upon persons who are convicted of being incorrigible rogues, in the case of *Edwards*, 2 Cr. App. R. 79; 73 J. P. 286 (1909). In the present case, as in that case, there is no evidence of aggravating circumstances. Appellant did not say anything of a menacing character to anyone. In these circumstances we shall reduce the sentence to six months' imprisonment with hard labour. But appellant is thirty-eight years old, and there is absolutely no reason why he should not work. If he comes up in the future he will most certainly never be treated so leniently again.

Sentence reduced.

Solicitors for the Respondent—*Wontner & Sons.*

A. R.

William Totterdell.

WILLIAM TOTTERDELL.

The proviso to sect. 4 (1) of the Criminal Appeal Act applied, despite the misreception of a deposition in evidence and a clear misdirection to the jury.

This was an appeal against conviction on law, and an application for leave to appeal against sentence. Appellant was convicted of larceny at the Devon Sessions on October 6, 1910, and sentenced to twelve months' imprisonment with hard labour. Mrs. Watson, with whom he was tried, was convicted and bound over in her own recognizance of £20.

J. Lhind Pratt, for the appellant, who was not present. Appellant eloped with the prosecutor's wife, and certain articles al-

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leged to be the property of the prosecutor, Watson, were taken away by appellant or the prosecutor's wife, among which were included a watch, a teapot, and a suit of clothes. The watch was subsequently pawned by appellant. He never intended permanently to deprive the prosecutor of his property in it. I submit that certain evidence was wrongly admitted.

The deposition of the witness, Susan Godfrey, was wrongly admitted, neither of the two conditions laid down by s. 17 of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, having been complied with. First, the witness Lucy Godfrey only gave evidence that Susan Godfrey was ill. She did not say that her illness was such as to prevent her attendance to give evidence. The medical certificate which stated that Susan Godfrey was too ill to attend was not evidence—it could not be cross-examined to. The doctor himself ought to have been called. Secondly, there was no evidence given by the prosecution that the deposition was taken in the presence of appellant or that he had an opportunity of cross-examining the witness before the justices. The onus was on the prosecution to prove this, and they ought to have called the clerk to the justices to do so.

The second ground of appeal was that there was no evidence that the suit of clothes was the property of the prosecutor. The evidence, on the contrary, shewed that it was purchased by Rose Watson in her husband's absence at sea without his knowledge or authority. The property in the suit of clothes was, therefore, in her and as appellant dealt with it with her consent, no charge of larceny could be sustained against him in respect of it.

The Chairman misdirected the jury in telling them that it was open to them to convict the appellant of receiving the goods knowing them to have been stolen. No count was added to the indictment charging this offence, and no such count could have been added. The taking by the woman was an offence under ss. 12 and 16 of 45 & 46 Vict. c. 75, the Married Women s Property Act of 1882. A married woman could not be guilty of the larceny of her husband's property either at common law or under the Larceny Act of 1861. The receiving on the part of the appellant was, therefore, not within the wording of s 91 of the Larceny Act of 1861, which provides that "whosoever shall receive any chattel . . . the stealing . . . whereof shall amount to a felony *either at common law* or *by virtue of this Act*, know-

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ing the same to have been feloniously stolen . . . shall be guilty of a felony." *Streeter*, (1900) 2 Q. B. 601; 69 L. J. Q. B. 915; 83 L. T. 288; 64 J. P. 537; 19 Cox C. C. 570; C. C. R., is conclusive on this point.

The effect of the misdirection has been that no one could now say of which offence or in respect of which article appellant had been found guilty. The evidence in regard to the teapot and the watch was consistent with the appellant's innocence, and the Court, therefore, ought not to exercise their powers under s. 4 or s. 5 (2) of the Criminal Appeal Act, 1907.

The sentence was excessive. The Court ought not to uphold what was, in effect, a punishment for adultery. The value of the articles stolen was trifling; the watch, when new, costing no more than £3 to £4. There was not the slightest evidence on which the jury could find that the woman acted under the influence of appellant.

Pridham Wippell (with him *R. Palk*), for the Crown, was not called upon.

The Lord Chief Justice: Though there were serious irregularities in this case to which we must call attention, we do not think there is ground for interfering with the verdict.

The articles that were alleged to have been stolen included a watch—a somewhat peculiar sailor's chronometer worth £4—and a teapot. The watch was left by the prosecutor in his wife's possession with instructions to her to take care of it during his absence. It does not seem likely that appellant did not know it was the prosecutor's watch when he sold it; and though it is suggested that he only meant to pawn it, he certainly did not do so in the belief that it was the property of the wife. As regards the teapot, it is possible appellant might have had some belief that it belonged to the wife. But however that may be, the jury were properly directed on the point.

Objection was taken to the admission of the deposition of Susan Godfrey. All that was proved by Lucy Godfrey before the deposition was put in, was that Susan Godfrey, when going to the station the day before, was taken ill and a doctor sent for. Then the doctor's certificate was put in: the certificate was not evidence. The statute (11 & 12 Vict. c. 42, s. 17) says, "if upon

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the trial . . . it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is . . . so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence . . . without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The statute requires a "credible witness," but not necessarily medical evidence. It was suggested that there was no proof that the deposition was signed, or even taken in the presence of the defendants. It may well have been that counsel for the two prisoners were not anxious to shut out the deposition, but the Court ought to have seen that the provisions of the statute were complied with before allowing the evidence to be put in. In general, however, the deposition only related to the suit of clothes alleged to have been stolen; but it must be understood that where the statute lays down certain conditions for the reception of depositions in evidence, those conditions must be performed. The learned Chairman properly directed the jury that they could convict for the theft of some of the articles and acquit as to the other articles, and that they could convict one prisoner and not the other. *R.* v. *Streeter* is clear authority for saying that the Chairman was wrong in directing the jury that they could convict of receiving. But neither the omission nor the misdirection has resulted in any miscarriage of justice. We are satisfied that the jury meant to find the prisoner guilty of stealing. In our opinion we ought not to reduce the sentence. The jury were of opinion that the woman acted under the influence of the appellant; and in all the circumstances, we do not think the sentence was too severe.

Appeal dismissed.

Solicitors for the Appellant—*Clyde S. Mossop,* Ottery St Mary.

A. B

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Robert Sidney Hudson.

ROBERT SIDNEY HUDSON.

Severity of sentence.

This was an appeal by leave of Pickford J. against a sentence of seven years' penal servitude passed at Northamptonshire Quarter Sessions on 20th October, 1910, for house-breaking. Appellant was present and handed in a memorial to the Court.

P. M. Burton, for the Crown: No doubt the sentence is a severe one; the Chairman of Quarter Sessions, from his remarks in passing sentence, seems to have felt he was passing a severe sentence, but at the same time to have felt a difficulty how to deal with a person of this type. The facts shew that the premises, a labourer's cottage, were entered during the absence of the owner by breaking in the back door with an axe. It is true that appellant was surprised in the house before he had taken anything of any substantial value. There are, however, ten previous convictions since 1893, mostly for offences of a similar character, while his sentences include two terms of penal servitude.

The Court reduced the sentence to four years' penal servitude with the remark that appellant must not expect much leniency if he got into trouble again.

Sentence reduced

A. R.

Benjamin Pickering Richardson.

BENJAMIN PICKERING RICHARDSON.

Severity of cumulative sentences.

This was an appeal against sentence by leave of Pickford J. Appellant was convicted of larceny on 2nd July, 1910, at the Middlesbrough Borough Sessions, and sentenced to nine months' imprisonment with hard labour.

Appellant, who was not present, was not represented.

Dorman, for the Crown, did not address the Court.

PICKFORD J.: Appellant stole a bicycle at Middlesbrough and

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rode away on it to Ripon. He also, very shortly afterwards, stole some money at a lodging-house. For the theft of the money he was sentenced at the Ripon Sessions to four months' imprisonment with hard labour, and was in prison for the two months of May and June. On 2nd July he was tried at the Middlesbrough Sessions for the theft of the bicycle, and sentenced to nine months' imprisonment with hard labour, so that for the two offences he has been sentenced to thirteen months. He has served the sentence of four months. We think that, had both the offences been before the same or either Court simultaneously, neither would have imposed thirteen months for the two offences. In these circumstances, we think the sentence should be reduced to six months' imprisonment with hard labour.

Sentence reduced.

A. R.

JAMES ROWAN.

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James Rowan.

When defendants are tried together and set up different defences the direction to the jury must state clearly the difference.

This was an appeal against conviction, by leave of Pickford J Appellant was convicted at the West Riding Sessions on 19th October of larceny, and sentenced to three years' penal servitude.

Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was tried with one Murtough for the larceny of two blankets and other articles from a tent belonging to some people who were camping out. The point I am going to take is that appellant's defence was not left to the jury at all, and that he was credited with the defence of his fellow prisoner. The Chairman ought to have drawn a clear distinction.

The facts were that some artists had been camping out near Keighley in a tent. In the tent were left some blankets, sheets, and blacking brushes. The evidence shewed that at 5.30 on the evening of September 5th, the prisoners were seen going to Keighley together. Murtough was carrying a sack; they were

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given a lift by a milk-boy named Seward, and there is some slight evidence against appellant from this boy Seward, viz., as to appellant having a blanket under his coat. This evidence, however, was elicited by means of a leading question, and in any case it is not clear whether it was Rowan or Murtough that the boy really intended to indicate.

On September 7th the blankets were sold in Keighley by Murtough. Neither of the prisoners went into the box.

Appellant's story was that he was walking along this road having come from his work at Wheatley Head, which is three-quarters of a mile away from the scene of the theft, when he saw Murtough getting over a hedge with a sack containing something. Appellant offered to get Murtough a lift in Seward's cart, and they then drove off all together. He was working at the time. I do not think it will be disputed.

[*H. Newell*, for the Crown: There is not the slightest evidence that appellant was working.]

He said he was working at Willy Cleave's house, but that one Adamson was the contractor.

The two prisoners made statements from the dock. Appellant's statement is completely borne out by Murtough, and Murtough's statement fully admits the story of the prosecution with the exception that he had not stolen but had found the sack. Whether appellant told this story to the magistrates, I do not know. I have not seen the depositions. I now submit that the learned Chairman failed to distinguish between the two defences. He invites the jury to find the prisoners guilty if they are not satisfied that the story that they had found the blankets was a true one. Appellant never said he had found the blankets. Whatever the defence of a prisoner may be, however improbable, he is entitled to have it put to the jury. *Dinnick*, 74 J. P. 32; 26 T. L. R. 74; 3 Cr. App. R. 77 (1909): *Richards*, 4 Cr. App. R. 161 (1910).

Harold Newell, for the Crown: Appellant did not give evidence on oath. I submit the case was fairly put to the jury. The statements of the prisoners were fresh in the minds of the jury. They were together at one stage in the cart, and there is

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evidence that appellant was hiding a blanket under his coat. The Chairman puts it: "Has he given you a satisfactory reason for his being in possession of stolen goods?" And there was the evidence of Seward that he had the blanket concealed under his coat.

[PICKFORD J.: It is rather too strong in all the circumstances to say that that shews he was in possession of stolen goods. The boy did not identify the blanket.]

At the last hearing before the magistrates nothing at all was said about this story put forward by appellant at the trial. No inquiries have been made by the police as to work done by appellant at Wheatley Head.

Mockett in reply: Comment has been made on the fact that appellant did not go into the box; but neither did the defendant *Richards* in the case cited.

The LORD CHIEF JUSTICE: In this case we have felt considerable doubt, but have decided to allow the appeal for two reasons. First, that it is better to err on the side of letting off a guilty, than run the risk of convicting an innocent man; and secondly, there still remains an opportunity for further investigation, as there are two other indictments, connected with the same transaction, still remaining to be tried.

The objection taken in this case is one which this Court has frequently had to consider, viz., whether the case developed by the defence has been fairly put to the jury. Those who study the reports will see that by far the greater number of successful appeals depended upon misdirection, and not on the ground that juries have on proper directions returned improper verdicts.

This man Rowan was indicted with another man named Murtough for stealing two blankets and other articles from a tent belonging to two or three people who were camping out. The articles were put into a sack by Murtough (who does not appeal), and Murtough was found in possession of them. The appellant saw Murtough getting over a hedge with a sack containing certain articles, and offered to get him a lift in a milk cart

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which was coming along. They got into the milk cart together and were driven along for some distance by the boy Seward. At a certain place the boy alighted and was absent for a short while. When he came back he observed that the sack was no longer there, and the suggestion was made that the goods had been divided, and that each man had something under his coat. Appellant said he had been working some three-quarters of a mile away from the scene of the theft at a place known as Wheatley Head, and there is no doubt that, apart from the question of his coming from work, the facts seem to confirm his statement to a certain extent. It was very unfortunate that appellant did not give his evidence on oath, as on cross-examination he might have been tested.

In our opinion the learned Chairman in his summing up to the jury has mixed up the two cases. He has failed to distinguish sufficiently between Rowan's defence and Murtough's defence. For instance, he says in one place that the prisoners said they had found the sack. Rowan never anywhere stated that he had found the sack. Again, in the last part of his summing up the learned Chairman said: "I have to point out to you further that if they were in possession . . . knowing the goods to have been stolen, they are guilty." That in no way draws attention to the distinction between the two defences.

The only really substantial evidence against the appellant was that the boy Seward said he noticed something that looked like a white blanket under the coat of one of the two men, and when asked in Court to say which man he meant, he indicated the "far one," meaning Rowan, the appellant.

But in the depositions, signed by Seward, we find him saying "Prisoner Murtough appeared to have something under his coat." In these circumstances, we think there is considerable doubt whether the boy meant that he saw Rowan with a blanket under his coat.

There are two other indictments, and inquiries ought to be made as to whether the appellant was really at work at Wheatley Head.

All we do at present is to quash this particular conviction. Appellant will be admitted to bail, pending the trial, in his own recognizance for £20. Even if the Court of Criminal Appeal

had no power under s. 14 of the Criminal Appeal Act to grant bail in such a case as this, we can do so as judges of the High Court.

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Conviction quashed.

A. R.

CHARLES REGINALD BARKER.

Charles Reginald Barker.

False pretences alleged in an indictment must be proved by evidence of false statements of existing facts, and not by promises of future conduct, but if such promises imply a false representation that a genuine business is being carried on, a count charging such a false pretence may be supported by evidence of such promises.

This was an appeal against conviction, by leave of Pickford J., and an application for leave to withdraw notice of abandonment of appeal.

Appellant was convicted on October 14th at the Surrey Sessions of obtaining money by false pretences, and sentenced to four months' imprisonment with hard labour. It had been his practice to go from house to house offering to enlarge photographs, in some cases free of charge, and to mount and frame the enlargements when done. He demanded prepayment for mounting and framing, and it was alleged that he obtained such payment by means of the false pretences laid in the indictment.

Makins for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant applied for leave to appeal on 24th October, and on 2nd November was granted leave and assigned legal aid. On 3rd November he signed a notice of abandonment, not having heard that leave had been granted. He then applied to withdraw his notice. The Court will see that he was only sentenced to four months' imprisonment; he signed the notice because he objected to the delays incident to appeal.

[The Court allowed the notice to be withdrawn.]

The ground of this appeal is that there was no evidence that

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any one of the false pretences alleged was made at all. Such statements as were proved to have been made were not statements of existing facts, but promises as to future conduct.

[PICKFORD J.: It seemed to me that the Chairman had put the case to the jury as if the allegation of false pretences was as to a genuine business being carried on. If that had actually been laid in the indictment I do not know what would have been the result. The specific allegations of the indictment were not put to the jury. That is why I gave leave to appeal.]

The first false pretence alleged was that he had then taken a shop in Cranleigh. The witness Laura Stemp, the only witness as to this allegation, says nothing whatever about that having been said. The second false pretence alleged was "that he was then prepared to enlarge two photographs for 4*s*. 6*d*." As to this and other alleged false pretences, I submit there was only a promise as to future conduct and not a representation of an existing fact.

On the merits, appellant actually entered into negotiations for a shop, and did bring a proof of a photograph, sending the photo framed two days after arrest.

E. Jones Williams, for the Crown: My submission is that the evidence was sufficient to justify the verdict.

There were false pretences of existing facts; appellant said he was enlarging photographs free of charge as an advertisement; in his evidence he admitted he was not a photographer at all, and had to send the photographs to other people to be enlarged.

He also represented that he was able to supply the photos within a week; it was not till five months after the orders were given that any photo was supplied, and then it was only the prosecutrix who received one, and that was after his arrest. Taking all the circumstances into consideration, the Chairman's summing up was fair. Appellant said in cross-examination that he sent the photos on to some one else to be enlarged. Yet he offered to do them himself as an advertisement, because he was taking a shop in Cranleigh.

I also submit that there was no miscarriage of justice, and

that the case is within the proviso to sect. 4 (1) of the Criminal Appeal Act.

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DARLING J.: In this case we are of opinion that the appeal must be allowed, though not on account of any merits in the appellant.

A count might have been framed which, on the evidence, might well have sustained a conviction for obtaining money by false pretences. Had a count been inserted alleging that appellant had falsely pretended he was carrying on a genuine business, the conviction would have stood. But the indictment alleged several false pretences which required technical proof of a false pretence of existing fact. Not one of those false pretences laid in the indictment was proved by the evidence called at the trial.

The appeal must therefore be allowed, although we very much regret it. Appellant was engaged in a very dishonest system of getting money from such people as servant girls, who could but ill afford to lose it.

The indictment ought to have been differently drawn.

Conviction quashed.

A. R.

JOHN HARRIS.

John Harris.

Proviso to sect. 4 (1) *of the Criminal Appeal Act applied on appeal on the ground that the indictment was bad.*

This was an appeal against conviction on a point of law, and from the refusal of Ridley J. to grant legal aid. Appellant was convicted on October 20th at the North Riding Sessions of attempted larceny from the person and sentenced to eighteen months' imprisonment with hard labour.

Appellant, who was not present, was not represented.

H. C. Meysey-Thompson, for the Crown, was only called on as to the omission of the words "take and carry away" in the

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indictment. I submit the indictment, which is framed under s. 40 of the Larceny Act, 1861, is good. The only reason given for omitting the words is that "steal" includes "take and carry away" in s. 40, and it is the practice to follow the words of the section, and not to insert "take and carry away." This is only attempted stealing. "Attempted to steal" is a sufficient description of the offence within s. 24 of the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100. Taking and carrying away is not an essential part of the offence of attempting to steal. The offence comes within the words of 7 Geo. IV. c. 64, s. 21, the Criminal Law Act, 1826, the omission being cured by verdict.

In any case, I submit the case comes within the proviso to s. 4 (1) of the Criminal Appeal Act, 1907.

PICKFORD J.: In this case the only objection taken is that the indictment was bad, because it omitted the words "take and carry away," which are the ordinary words in an indictment for larceny.

If it were necessary to decide whether the omission did or did not make the indictment bad, we should think it right to have counsel appear for the appellant in order to argue the point properly on the appellant's behalf. We do not think it necessary in this case. It may come up in some other case, but we express no opinion on the point.

We are clearly of opinion that this case comes exactly within the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. It was on the clearest possible evidence that the jury convicted the appellant. There is no appeal on the merits. So that it is impossible to say that the omission has occasioned any actual miscarriage of justice.

Appeal dismissed.

A. R.

WILLIAM WYTON.

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William Wyton.

A person who acts as a mere conduit pipe for making bets between a bookmaker and his customers, though he has no pecuniary interest in the transactions, may be guilty of using the premises where he is employed for the purpose of betting "with persons resorting thereto."

Severity of sentence.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on the facts and against sentence. Appellant was convicted at the East Sussex Quarter Sessions on October 19th, 1910, of permitting the use of a house for betting, and sentenced to three months' imprisonment, and to pay the costs of the prosecution.

H. S. Bompas, for the appellant, who was not present. Appellant was convicted under ss. 1 and 3 of 16 & 17 Vict. c. 119, the Betting Act, 1853, of permitting a man named Dawes, in his employment, to use certain premises for the purpose of betting with persons resorting thereto. The evidence was that Dawes took money and betting slips from customers, put the money on with a bookmaker named Mills, and then, if successful, drew the money from Mills and paid the customers. Three other men were charged together with appellant and Dawes, but the three were discharged for want of evidence. The premises in question were a hairdresser's shop, Wyton being the tenant and Dawes being his manager and assistant. Dawes was convicted of using the place for the purpose of betting with persons resorting thereto, and appellant of permitting him to use it. My submission is that Wyton's conviction depended on Dawes being convicted. I submit that Dawes committed no offence under the statute, and that therefore appellant could not be convicted. The bets were not made by Dawes with the customers, but between Mills and the customers. Dawes was merely the agent for the customers to make bets with Mills, who was not resorting to the premises. Dawes had no pecuniary interest in the bets, and the customers looked to Mills for payment. Hence, on the authority of *Wright* v. *Clarke,* 34 J. P. 661 (1870); Q. B., no offence was committed. The mere paying over of the money by Dawes is no offence. *Bradford* v. *Dawson,* (1897) 1 Q. B. D.

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307; 66 L. J. Q. B. 191; 76 L. T. 54; 18 Cox C. C. 473; 61 J. P. 134.

The learned Chairman misdirected the jury in saying that Dawes himself betted with customers who came into the shop, and that they could convict on Dawes's story. There was no contractual relation between Dawes and the customers.

I submit the combined effect of *Wright* v. *Clarke* and *Bradford* v. *Dawson* amounts to this, that a man is not guilty if he is not the man to whom customers or other persons look for payment.

It is true Dawes was indicted for assisting in conducting the premises, bet it was never contended that he made bets. When the police entered, Gregory, one of the acquitted defendants, pulled out seven slips and offered them to Dawes, saying, "These are yours." Dawes refused to take them. I say that on these facts there was no evidence of betting going on or, at any rate, that Dawes ever made a bet. Counsel for Dawes took the point that all the facts shewed was agency by Dawes.

[DARLING J.: It amounts to this: if you keep a betting establishment for someone else you are not liable.]

No; only if you stand to gain nothing. Again, it cannot be said that Dawes was the agent of Mills; for Mills alone could fix the prices, and could refuse bets. All the customers knew they were betting with Mills. The bet could not even be started until Dawes went out to telephone to Mills. There was therefore no actual bet at the shop. Dawes was a mere agent, and therefore ought to have been acquitted if I understand Blackburn J. in *Wright* v. *Clarke*, above, at p. 663.

I also apply for leave to appeal against the sentence.

Raven, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: This case is really too clear for argument. If counsel could have shewn that there was no evidence to go to the jury, the case might have been different. It cannot be said there was no evidence that Wyton had committed

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an offence, or that he had no means of knowing an offence had been committed. The facts shewed that Wyton's shop was a convenient place for people who wanted to carry on betting transactions. They came in and found Dawes there. Dawes said he only took slips and went to Mills. When the place was raided, Gregory was found there; he occasionally went to the telephone as agent for Dawes. In Gregory's pocket were found some seven or eight slips, the ownership of which he asserted to be in Dawes. Can it be seriously contended that Dawes was not carrying on a substantial part of the betting business? We think he was carrying on the business on behalf of Mills. He clearly comes within the words of the section. The case of *Wright* v. *Clarke* only shews that in some other particular case there was evidence of actual betting carried on.

The view contended for can not be reconciled with that held in *Dunning* v. *Sweetman*, (1909) 1 K. B. 774; 78 L. J. K. B. 359; 100 L. T. 604; 73 J. P. 191; 25 T. L. R. 302.

As regards the sentence, fines in these cases are often no punishment. They are readily paid.

Appeal dismissed.

A. R.

Solicitors for the Appellant—*J. C. Buckwell & Co.*, Brighton.

ALFRED STEEL.

Alfred Steel.

An indictment alleging the obtaining of credit by fraud other than false pretences is not necessarily sustained by proof of a fraud that amounts to obtaining by a false pretence. But a count charging a conspiracy to obtain goods on credit fraudulently might be sustained by such proof.

The credit alleged to have been fraudulently obtained must have been obtained by and given to the person charged.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on the facts. Appellant was convicted on October 21st, 1910, at the West Kent Sessions of obtaining credit by fraud, and sentenced to six months imprisonment in the second division.

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H. G. Rooth, for the appellant, who was present. This appeal is grounded on misdirection, and I shall further contend that the verdict was against the weight of evidence.

The only charge preferred against the appellant was obtaining credit by fraud other than false pretences under the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 13 (1). If, on the facts proved, the charge amounts to obtaining by false pretences, the indictment fails.

[Darling J.: Could we not enter a verdict of guilty of obtaining by false pretences?]

I submit not; the indictment alleges certain things in very definite language. The case for the prosecution was that the prisoner obtained a lease of certain premises in the Asylum Road, Old Kent Road, in the false name of Perry; that he gave the premises a false description, calling them "The Magnet Dairy Farm"; that he then had post cards printed, headed with this description, and signed in another false name, "Hill," and that he thereby fraudulently obtained credit to the amount of £19 : 19*s.* 6*d.*, the value of 29 tons 12 cwt. of mangel wurzels for which he intended to avoid payment. The prosecution called a witness, Grove, to prove that the premises in the Asylum Road were taken from him (Grove) by a man who gave the name of Perry. It was said that Perry and appellant were the same person. Appellant, however, was not identified by Grove, who said he thought appellant resembled Perry, but that Perry was not so bulky a man as appellant, and had no moustache. Appellant was, no doubt, positively identified by a Mrs. Harmer, to whom the rent was paid by a man who accompanied appellant, viz., Bridge. My contention is that Hill was an existing person and that Hill was responsible for the post cards. There is no suggestion made of a "long firm" here. Hill was very like appellant, and I called two reputable witnesses to prove that Hill was in authority, and always took the rent book out when necessary.

The post cards were sent from the Asylum Road premises headed "Magnet Dairy Farm" to Chittenden, the prosecutor, who had advertised the sale of some mangel wurzels in the "Kent

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Messenger" newspaper, requesting the prosecutor to state his lowest price on rail. The cards were signed "W. Hill." In reply to this, Chittenden quoted a price and received another post card in the same form giving him an order. This card was lost, but in consequence of its despatch, the prosecutor consigned a sample truck to the address on the card. The prosecutor then received a third card, requesting him to wire Hill how many tons he could reserve for him at the same price, and eventually a request in writing signed by Hill was sent to the prosecutor for a further five trucks, or 29 tons 12 cwt. These loads were consigned by the prosecutor to W. Hill, Bricklayers' Arms Station, to be cleared by him. It was proved that appellant, in company with a man named Bridge, was present in the yard when they were cleared, and that appellant subsequently sold 15 tons to a man named Cooper. At the trial appellant was called, and two other witnesses, Young and Wallingford. These two latter witnesses proved the existence of Hill, and that Hill was in control of the premises. Appellant swore he was not "Perry," had never represented himself as such, had never spoken to Mrs. Harmer, had not represented himself as "Hill," and that Hill was an existing person, whom he looked upon as the tenant of the Asylum Road premises carrying on business there, and from whom he (appellant) rented two stalls. Appellant also swore that he knew nothing of the post cards, the receipt of which induced the prosecutor to part with his wurzels. The reason appellant came to be in the yard dealing with the wurzels with Hill was that he had "chopped" [bartered] a horse and van for the wurzels with Hill. He further swore that he had not spoken to Bridge for two years in consequence of the latter having stolen some horses of his. Young and Wallingford both supported appellant as to the "chop," the former also alleging that he wrote the letter on which the credit was given, at Hill's dictation. The identification of the appellant by Mrs. Harmer was insufficient, and in all probability she mistook Steel for Hill. There was no proof that appellant had had the headings to the post cards printed, nor was there any evidence that the cards were in his handwriting or had ever been seen by him. The only evidence before the jury was the letter (one of the series of post cards which induced the prosecutor to give credit to the writer Hill), and this was admitted by Young to have been written by him in the course of his

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employment, at Hill's dictation. The learned Deputy-Chairman told the jury they ought to accept Young as a truthful witness. One would suppose the prosecution would have attacked Young; they did not. It was put later in the case, and when the prosecution were shifting their ground, that Hill and appellant were acting in concert.

That was not the case opened for the prosecution. If it had been I should not have called Young and Wallingford to prove Hill's share in the transaction.

All that was really left of the case against appellant was that he had been seen dealing with the wurzels. His explanation that he had "chopped" a horse and van for the goods was quite a reasonable one, bearing in mind that his business was that of a horse dealer.

If anything, the case was that of obtaining goods by false pretences, and if that contention be correct, the indictment fails. *Cosnett*, 20 Cox C. C. 6 (1901); C. C. R.

[DARLING J.: If you are right, appellant has never been in peril on this indictment, and a fresh indictment can be preferred against him.]

Such a course would be most unusual, and the statute under which the appellant was indicted falls within those included in the Vexatious Indictments Act. Consequently no fresh bill could be preferred without a fresh committal.

[DARLING J.: You had better take the point of misdirection, and not that as to the fraud being other than a false pretence.]

At the conclusion of my address, the prosecution adopted a totally different attitude, accepting the fact that Hill existed, but submitting that appellant was co-operating with Hill. I objected, but the objection was overruled by the learned Deputy-Chairman, who, in summing up, adopted the new attitude of the prosecution. In the course of the summing up the Deputy-Chairman said: "If you have one, two, three, or four people acting in concert and fraudulently ordering these goods, and you are satisfied that the prisoner was one of them, it is not material whether he wrote the post cards, and you must find him guilty."

This is the passage to which I chiefly take exception. The exposition of the law is, no doubt, good, but was totally inapplicable to the case presented by the prosecution. Had this view of the case been taken at the opening, the appellant's witnesses would have become unnecessary, and consequently I should have had the last word with the jury.

C. M. Pitman, for the Crown. The offence was dealt with generally in opening. I admit that no evidence was given that the post cards were sent by the appellant. It was proved, however, most positively, that he took 37, Asylum Road, in the name of Perry—a false name. It was also proved by an employee of the railway company, named Read, that Bridge and the appellant cleared the wurzels together; the appellant's witnesses both swore that appellant and Bridge were daily in each other's company; and though Bridge was discharged by the magistrates, he was unquestionably involved with both Hill and the appellant. These witnesses were not in Court when the appellant was examined; appellant denied that he had been in Bridge's company for over two years. He was, therefore, proved to have lied. I submit appellant is not a man to be believed at all.

If the evidence was sufficient to shew the jury that these three men, Hill, Bridge and appellant, were all together in these premises—premises which were taken in the name of "Perry," and were not a "Dairy Farm" at all, but merely a piece of waste land—and if, moreover, there was evidence that the heading of the post cards did impress the prosecutor, then I submit the jury were justified in coming to the conclusion that all these men were concerned together in this fraud, even if the prosecution had failed to establish the individual writer of the card.

My submission is, that even if appellant did not obtain credit for himself, that would be no defence to this indictment, or to an indictment for conspiracy, because the credit given by Chittenden was a joint one to both appellant and Hill. *Bryant,* 63 J. P. 376 (1898).

[Pickford J.: You must make out that they were partners. The credit here was given to Hill, even though Hill and appellant shared the goods.]

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[Darling J.: The indictment runs "that A. B. . . . unlawfully in incurring a certain debt and liability to one C. D. did obtain credit . . ." That indicates clearly enough that credit must have been given to him; it means, in this indictment, that *he* (appellant) in incurring a debt, did *himself* obtain credit.]

The summing up of the learned Deputy-Chairman must be taken in its entirety. It was quite impartial, and the jury were not directed to convict.

Rooth, in reply. The credit was given to Hill and to no one else. Hill was the only person who could have been sued for the debt in civil proceedings. The charge proved (if any) was a conspiracy for which the appellant was not indicted, and therefore the Deputy-Chairman misdirected the jury in the passage I have previously cited.

The Lord Chief Justice: This is a case of great difficulty. It brings into relief what we have said from time to time as to cases in which we ought to have power to award a new trial, where it is established that the direction to the jury was insufficient. There was evidence to go to the jury here.

The only charge put to the jury was that the appellant had been unlawfully incurring liability to the prosecutor to the extent of £19, and had obtained credit to that amount by means of fraud other than false pretences.

It must be remembered that a fraud which amounts to a false pretence may not of necessity be sufficient to satisfy such an indictment as the present one, unless there is a very clear statement as to what the false pretence was.

The statement on the post cards "W. Hill, Magnet Dairy Farm" was certainly fraudulent, and in some circumstances it might amount to a false pretence.

I understand how the prosecution came to shape their case differently. Having regard to appellant's story—his contradiction of the allegation that he had taken the premises in the Asylum Road in the name of "Perry," and was the same person as Hill, his statement that Hill was an existing person whom he (Steel) looked upon as the tenant of the premises carrying on the busi-

ness there, his statement that he had not seen the man Bridge, with whom he was alleged by the prosecution to have been clearing the wurzels, for two years, and the way in which he accounted for being in possession of the wurzels—having regard to all these statements, and the facts as proved by the prosecution, it seems to us that it was open to any tribunal to suppose that after all this was a mere change of names, and that these men, Hill, Bridge and Steel, were all together on the premises for doubtful business, and that Hill and Steel were one and the same man. That, however, was not the case opened to the jury. The prosecution opened that Steel was a party to the sending of the post cards. It was to a large extent suggested that Hill did not exist at all. Then evidence was given on behalf of the defence to shew that there was in fact a person named Hill, and that letters and post cards were written for Hill by Young.

In these circumstances, it seems to us difficult to hold that there was a fraud other than false pretences on the part of Steel.

If appellant was not connected with the actual sending of the card and thereby obtaining credit in the name of Hill, it was the duty of the learned Chairman to indicate this to the jury. He does not seem to have done so. We think that there ought to have been a direction to the jury that they must find Steel to have been a party to sending the post card through Hill, before they could find him guilty. Then was the time to give appellant's own account, and ask the jury whether they believed it. The *onus* was put on the appellant at too early a stage in this case, and the direction of the learned Chairman was not sufficient.

Had there been a count here that Steel was concerned in a conspiracy for obtaining goods on credit, then this evidence of obtaining premises in a false name, the fact that he had possession of the goods, and the fact that these various men were all connected together in the transaction, all this would, we think, have been abundant evidence to go to the jury on such a count.

But he was only indicted for obtaining credit by fraud, and there being no sufficient evidence of Steel being a party to the making of the fraudulent representation which induced the prosecutor to part with his wurzels, we think the summing up was insufficient to enable the jury to find a verdict of guilty on the only charge for which he was indicted.

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Alfred Steel.

We must err on the side of letting a guilty man go free rather than run the risk of convicting an innocent man.

Conviction quashed.

A. R.

Solicitor for the Appellant—*A. R. Dagg.*

JOHN WALKER AND THOMAS MALYON.

21 *November.*

Fresh evidence raising grave doubt is ground for quashing a conviction.

John Walker and Thomas Malyon.

This was an appeal against conviction by leave of the full Court. Appellants were convicted on October 19th, 1910, at the Essex Sessions, of larceny, and Walker was sentenced to six months', and Malyon to nine months' imprisonment with hard labour.

The charge against the appellants was that on 9th September they stole a wooden till and 32*s*. in money, the goods and money of Ernest Hands. The case for the prosecution was that at 10 p.m. of 9th September, three men with a cart or barrow and a chestnut pony stopped a short distance away from the prosecutor's shop, and that one of the three walked in and abstracted the till. The prosecutor's wife said she saw Thomas Malyon driving the barrow, and had a good view of his face. She did not identify John Walker by his face, but could almost swear to his build. The prosecutor also gave evidence of identification. A chase was set afoot after Clarke P.-C. had come upon the scene, and after half-an-hour Thomas Malyon was arrested outside the "Prince Albert" public-house. Walker was arrested six days later, and, when arrested, replied "All right." The till was stolen before 10 o'clock from the shop of the prosecutor. One Enever gave evidence that at 9.45 he saw appellants leave the "Prince Albert."

On the 14th November, 1910, *H. Warburton*, for the appellants (under s. 10 of the Criminal Appeal Act), applied for leave to appeal against the conviction and to call further evidence on the ground that circumstances had arisen subsequently to the trial which made the case one for further

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inquiry. For appellants it was argued that the case turned entirely on identification, and that the identification of Mr. and Mrs. Hands was very unsatisfactory. Neither had ever seen the prisoners before. The policeman had merely seen someone standing under some shadow at a distance of at least twenty yards from him. Two police sergeants, on a tour of inspection, went into the "Prince Albert," but did not recall having seen either of the appellants there. The prosecution had made altogether too much of Walker's remark when arrested. It was open to any construction.

The case for the appellants was a complete *alibi*. Enever had no particular reason for seeing anyone on the night in question, and the learned Chairman had laid far too great emphasis on his evidence. It was also pointed out that at the trial there were three people (including Gomme, who was the guilty man) standing by to see what the result of the trial would be, and that at the end of it one of them walked up to the Bench, saying, "You have convicted innocent men; I stole the till," but was promptly hustled out of the Court. It was further mentioned that a Mr. W. Walker, cousin of one of the appellants, had addressed a letter, shortly after the trial, to the Home Secretary, in which he stated that he could identify the three men (one of whom was a man named Gomme) who were in the barrow on the night of the theft, and that Gomme had admitted stealing the till. It was said that the gist of W. Walker's letter was that Gomme committed the theft while going about in the company of Arthur and Jack Malyon, brothers of the appellant Thomas Malyon, between whom there was a considerable family resemblance.

The Court gave leave to appeal and to call Gomme, Arthur and Jack Malyon, and any other witnesses the Registrar might allow.

Warburton called and examined W. Walker, Gomme, Jack Malyon, and Arthur Malyon, who bore out the case he had opened on the application.

Gomme confessed the crime, and in answer to the Court stated that his confession was voluntary; he gave a description of the stolen till, which was corroborated by Hands, the prosecutor,

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John Walker and Thomas Malyon.

who was called by the Court. Walker stated that he did not attend the trial because he thought appellants would be acquitted.

St. John Morrow, for the Crown, cross-examined some of the witnesses.

Appellants were present.

The Lord Chief Justice: This case is one of very great difficulty. It is right to say that we should have hesitated a long time before acting on the statement of Gomme, who certainly ought to be punished either for stealing the till or for committing perjury to shield someone else. He can be prosecuted for the former without a doubt. He told, or attempted to tell his story at Chelmsford after the conviction of the appellants, and has repeated it on oath here. With regard to Gomme being the man who committed the theft, there are one or two matters which go to corroborate his confession. It must be remembered that none of the various persons connected with the case attempted to identify the man who took the till. But there are two things spoken to by Gomme which do not enable one to check the probabilities: the evidence that the little tray was made of mahogany and the fact of its having a wooden partition. The prosecutor gave a description very much to the same effect. This affords some slight corroboration of Gomme's story.

Where there is substantial doubt on a material point, a prisoner ought to have the benefit of the doubt.

In this case there is no sufficient evidence connecting the appellants with the man who went into the shop. There was, undoubtedly, evidence for the jury that a cart and pony were outside the shop for some time, or at a corner no more than twenty yards distant. There was, further, the evidence of Mr. and Mrs. Hands and of Clarke P.-C. that the people connected with the robbery had been there with a pony some time before. There is next to no evidence connecting the persons who drove off with the man who stole the till. The evidence of identification is therefore very unsatisfactory. But both counsel for the prosecution and the learned Chairman seem to have thought that Enever's evidence was quite conclusive of the guilt of the appellants. That seems to us to be going too far, for it depends en-

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John Walker and Thomas Malyon.

tirely upon their having been in company with the man who went into the shop.

It is difficult to see why the brothers who gave evidence to-day could not find out what had been proved against their brother Thomas Malyon. Why did they not go to his solicitor and say they were the persons who were about with the pony? But, as Mr. Warburton says, it is possible they might have feared to commit themselves too much. It is true, moreover, in the case of the witness W Walker, that he did make very prompt communication with the Home Secretary, although if he knew before the trial at Chelmsford what was alleged against the two appellants he ought no doubt to have spoken out at once.

As regards the previous records of the appellants, it seems that Thomas Malyon has not been in any very serious trouble before. In 1895-6-7 he was convicted of various assaults on the police. The other man Walker was convicted in the beginning of this year for stealing a rug, in addition to one other conviction in 1910; he was also convicted in 1908 for assaulting the police.

In these circumstances the only ground upon which we can interfere with this case is that if this evidence, which has been given to-day, had been before the jury, it would have raised such an amount of doubt as to justify the learned Chairman in saying to the jury that if they had any reasonable doubt they ought to acquit, and had Gomme come forward before it might have had the effect of the jury acquitting without any doubt.

We can only give effect to that view by saying that a doubt has been raised on a substantial matter, and that the appellants ought to have the benefit of that doubt. We therefore quash the conviction upon the evidence which we have heard to-day.

Convictions quashed.

A. R.

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